

Prince Fashions, Inc. v 542 Holding Corp.

2004 NY Slip Op 30244(U)

July 7, 2004

Supreme Court, New York County

Docket Number: 120149/02

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK
J.S.C.

PART 12

Justice

0120149/2002

PRINCE FASHIONS, INC.,
VS
542 HOLDING CORP.,

SEQ 03

INDEX NO. 120149/02

MOTION DATE _____

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

The following papers, if any, were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUL 14 2004

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 7/14/04

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
BARBARA R. KAPNICK
J.S.C.

J.S.C.

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: XAS PART 12

-----X
PRINCE FASHIONS, INC.,

Plaintiff,

DECISION/ORDER

-against-

Index No. 120149/02
Motion Seq. No. 003

542 HOLDING CORP.,

Defendant.

BARBARA R. KAPNICK, J. :

FILED
JUL 14 2004
COUNTY OF NEW YORK
CLERK OF THE COURT

Plaintiff Prince Fashions Inc. is the commercial tenant of the subject premises consisting of the stores, basement and vault area in the building located at 542 Broadway, New York, New York pursuant to a 99-year lease, with two 50-year renewal options. Defendant 542 Holding Corp. is the **owner** and landlord of the premises.

Plaintiff moved **by** Order to Show Cause on September 11, 2002 for a 'Yellowstone' injunction (see, First Natl. Stores v. Yellowstone Shopping Ctr., 21 N.Y.2d 630 [1968]) tolling the cure period set forth in a Notice to Cure dated September 4, 2002.

According to Peter R. Douglas, Esq., the President of the defendant cooperative corporation, the Five-day Notice was **delivered** to plaintiff on September 5, 2002 in compliance with the Lease as follows: (i) four copies by mail - one copy by certified mail and one copy by U.S. Postal Service Express Mail to each of Prince's two known addresses - at the subject premises and at 932

50th Street, Brooklyn, New York, an address set forth in the lease assignment; (ii) another copy was taped to the mailbox assigned to Prince Fashions at the premises at approximately 4:55 p.m.; and (iii) another **copy** was hand-delivered at the same time to an employee of plaintiff at the premises who identified herself as the plaintiff's 'cashier'. Mr. Douglas also authorized defendant's counsel to fax a copy of the **Notice** to plaintiff's **lawyer**, which was done on September 6, 2002 at 12:33 p.m., but there is no dispute that plaintiff also faxed a copy of the Notice to Cure to its counsel on **September 5, 2002**.

Defendant opposed the motion for a 'Yellowstone' injunction on the grounds, inter alia, that the motion was untimely because it was brought after the expiration of the five-day cure **period**, and after defendant had already delivered a Notice of Cancellation of Lease dated September 10, 2002 to plaintiff on September **11, 2002**.

It is well settled that

[a] tenant seeking **Yellowstone** relief must demonstrate that (1) it holds a commercial lease; (2) it has received from the landlord a notice of default, a notice to cure, or a threat of termination of the lease; (3) the application for a temporary restraining order was made prior to the termination of the lease; and (4) it has the desire and ability to cure the alleged default by any means short of vacating the premises (*see, First Natl. Stores v Yellowstone Shopping Ctr., supra; Matter of Langfur, 198 AD2d 355,...*; *Stuart v D & D Assocs., 160 AD2d 547...*). The courts have granted **Yellowstone** injunctions "routinely to avoid forfeiture of the tenant's interest and in doing so they [have] accepted far less than the normal showing required for preliminary

injunctive relief" (*Post v 120 E. End Ave. Corp.*, 62 N.Y.2d 19, 25...; *Matter of Langfur, supra*).

Long Island Gynecological Services, P.C. v. 1103 Stewart Ave. Assocs. L.P., 224 A.D.2d 591, 593 (2nd Dep't 1996).

However, when a tenant fails to **seek a** restraining order prior to the expiration of the cure period, "a tenant divests the court of its power to grant a *Yellowstone* injunction". Long Island Gynecological Services, P.C., *supra* at 593. See also, Austrian Lance & Stewart v. Rockefeller Center, Inc., 163 A.D.2d 125,127 (1st Dep't 1990).

In the instant case, plaintiff contends that it timely sought a restraining order because defendant's counsel **orally agreed** to extend the cure period through September 12, 2002. Defendant's counsel denies agreeing to such an extension.

By Decision and Order dated October 3, 2002, this Court (i) referred the issue of "whether or not defendant's attorney orally agreed to extend through September 12, 2002 the cure period set forth in the Notice to Cure dated September 4, 2002" to a Special Referee to hear and report with recommendations; and (ii) held plaintiff's motion for a 'Yellowstone' injunction in abeyance pending the report of the Special Referee and a motion pursuant to CPLR § 4403.

The matter was assigned to Special Referee Steven E. Liebman who held a hearing on December 17 and 18, 2002, and issued a report dated August 26, 2003 in which he found that plaintiff had failed to demonstrate by a preponderance of the evidence that defendant's counsel orally agreed to extend the **cure** period through September 12, 2002.

Defendant now moves for an order: (i) confirming the Report and Recommendations of the Special Referee; (ii) denying plaintiff's motion for a 'Yellowstone' injunction; (iii) vacating the temporary restraining order contained in the Order to Show Cause dated September 11, 2002; (iv) dismissing with prejudice on the grounds of 'res judicata' so much of the First Amended Complaint as claims that plaintiff was not provided with an accounting for the years 1996-1998 and precluding plaintiff from raising the claim it had previously withdrawn with prejudice regarding the absence of an accounting in the years 1994-1998 in any other proceeding; and (v) granting attorneys' fees to defendant for all the proceedings herein, as provided in the lease.¹

"Generally, New York Courts will look with favor upon a Referee's report, inasmuch as the Referee, as trier of fact, is considered to be in the best position to determine the issues presented. Courts will confirm a Referee's report to the extent that the record

¹ After receiving plaintiff's opposition papers, defendant withdrew that portion of its motion which sought to dismiss **the** remainder of the Amended Complaint without prejudice or, in the alternative, to stay all proceedings herein in favor of proceedings in the Civil Court.

substantiates his findings and they may reject findings not supported by the record (citations omitted)."

Matter of the Holy Spirit Association for the Unification of World Christianity v. Tax Commission of the City of New York, 81 A.D.2d 64, 70-71 (1st Dep't 1981), rev'd on other grounds, 55 N.Y.2d 512 (1982).

Plaintiff contends without any elaboration that the Referee's report is against the weight of the evidence.

Based on all the papers submitted, this Court finds that the findings of the Special Referee, whose function it was to "hear the evidence and resolve questions of fact and credibility," (Barr v. Barr, 232 A.D.2d 316 [1st Dep't 1996]), are supported by the record. Consequently, the Report of the Special Referee and, specifically, his finding that there was no oral agreement to extend the cure period, is hereby confirmed.

However, plaintiff now argues that the issue of whether or not there was an oral agreement is not dispositive of the issue of whether plaintiff's application for 'Yellowstone' relief was timely because the cure period did not expire until September 11, 2002; i.e., five days after **the latest date** the notice was received by plaintiff.

Defendant argues in reply that plaintiff has set forth no legal authority for the proposition that the cure period did not begin to run until after the last copy of the Notice was received by mail on or after September 6, 2002, rather than when the initial copies of the Notice were delivered to the premises on September 5, 2002.

Moreover, this Court notes that Paragraph 27 of the parties' Lease specifically provides that:

Except as otherwise in this lease provided, a bill statement, notice or communication which Landlord may desire or be required to give to Tenant, shall be deemed sufficiently given or rendered if, in writing, delivered to Tenant personally or sent by registered or certified mail addressed to Tenant at the building of which the demised premises form a part or at the last known residence address or business address of Tenant or left at any of the aforesaid premises addressed to Tenant, and the time of the rendition of such bill or statement and of the giving of such notice or communication shall be deemed to be at the time when the same is delivered to Tenant, mailed, or left at the premises as herein provided... (emphasis supplied).

Therefore, this Court finds that the time to cure began to run on September 5, 2002 when the Notice was delivered to the premises and expired on September 10, 2002, prior to plaintiff submitting its Order to Show Cause to toll the running of the cure period.


Accordingly, plaintiff's motion for a Yellowstone injunction is denied as untimely and the temporary restraining order issued on September 11, 2002 is vacated.

That portion of the motion seeking to dismiss "with prejudice on grounds of res judica so much of the First Amended Complaint as claims that Prince was not provided with an accounting for the **years** 1996-1998, and ordering that Prince is precluded from again raising the claim it had previously withdrawn with prejudice regarding the absence of an accounting in the years 1994-1998 in any other proceeding" is denied, as the First Amended Complaint in this action does not formally seek an accounting or an award of rent overcharges as was **sought** in the Eighth Cause of Action in the Second Amended Verified Complaint filed in the prior **action** (Index No. 110089/96), thus res judica does not **apply**.

That portion of the motion seeking an award of legal fees is denied as premature with leave to renew upon final determination of all the issues in this case.

This constitutes the decision and order of this Court.

Date: July 7, 2004



 Barbara R. Kapnick
 J.S.C.

FILED
 JUL 14 2004
 NEW YORK COUNTY CLERK'S OFFICE

BARBARA R. KAPNICK
 J.S.C.