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

PRESENT: EMILY JANE GOODMAN Justice

PART 17

Britti Const.

- v -

Perry Thompson Third LLC.

INDEX NO. 107172/04

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

and cross motion.

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED
MAY 05 2005
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/29/05

EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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BRITTI CORP.,

Plaintiff,

-against- Index No. 107172/04

PERRY THOMPSON THIRD LLC.,

Defendant.

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EMILY JANE GOODMAN, J.S.C.:

Plaintiff, a sub-tenant in commercial property located at 110-112 Thompson Street, New York (the Premises) moves for a *Yellowstone* injunction enjoining defendant Perry Thompson Third LLC (Defendant), from terminating a lease, dated November 9, 2001 (the Lease). Plaintiff also seeks a declaration that it is not in default under the Lease. Defendant opposes the motion, and cross-moves for dismissal of Plaintiff's complaint and for summary judgment and/or a preliminary injunction on its two counterclaims.[1] Plaintiff opposes the Cross Motion. For the reasons set forth below, Plaintiff's motion for a *Yellowstone* injunction is granted as provided herein. The Cross Motion to dismiss Plaintiff's complaint is denied, summary judgment is granted in favor of Defendant on its First Counterclaim to the extent that Plaintiff breached the Lease by making material alterations, without the prior written consent of Defendant, but is otherwise denied, and, an injunction is granted on the terms and conditions stated herein.

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[1]Subsequent to Defendant's Cross Motion, Plaintiff made a Cross Motion to dismiss Defendant's counterclaims. This Cross Motion is rejected because Plaintiff has not filed it properly with the court, nor paid the requisite fee.

FACTS

The premises are located in a cooperative building in a six story walk up, containing 30 residential units and two commercial units. The Lease is subject to an over lease, dated June 25, 1987, between the cooperative and Defendant (the Master Lease). The use clause of the Lease provides that the "Tenant shall use and occupy demised premises for Sandwich Shop & Coffee Bar with Liquor and for no other purpose" (see paragraph 2 of the Lease). Defendant alleges that Plaintiff violated the Lease by operating El Chulo Café, a Cuban restaurant, instead of the panini shop which Plaintiff had previously operated at the Premises. The crux of the dispute is Defendant's contentions that Plaintiff violated the Lease by cooking in violation of its use clause, by making material alterations, without Defendant's prior written consent, and by causing a violation to be placed on the Premises as a result of improper ventilation. Plaintiff does not deny that it initially informed Defendant that it would serve coffee, liquor and sandwiches at the Premises, but disputes that it represented to Defendant that no cooking would take place. Plaintiff admits making alterations with the "oral" consent of Defendant.

By letter dated November 21, 2001, the Department of Buildings stated that it had no objection to an Eating and Drinking Establishment, Use Group 6, Non Place of Assembly for less than 75 persons, but also indicated that "any new kitchen Equipment and Fire Protection System must be filed with this Department." It is undisputed that the architectural plans attached to the Statement of Responsibility, dated February 19, 2002, signed by the cooperative and Plaintiff's architect and, submitted to the Department of Buildings, did not indicate any cooking facilities or a kitchen.

It is also undisputed that an Environmental Control Board violation (no. 34431428R),

dated February 12, 2004, was filed against the cooperative for improper venting of the premises as the result of an "exhaust terminating within 10' of residential windows noted El Chulo Café basement level rear kitchen cooking equipment exhaust vents directly into rear yard within 10' 1st floor rear & fire escape." The remedy was listed as "provide proper ventilation as per New York City Building Code." An Environmental Control Board printout, submitted by Defendant, indicates a $400.00 fine for the violation.

In March 2004, Plaintiff prepared new plans for approval, which indicated a fully functioning kitchen (two sinks, a grease trap, electric fryer, electric grill, a six burner electrical stove, and a stainless steel exhaust hood). The plans also indicated a proposed 20 inch exhaust duct up the roof of the building to be attached to the rear wall, with exhaust fans to be located on the roof. Plaintiff has not alleged that the cooperative or Defendant had previously approved the installation of these items in writing.

By Notice to Cure, dated April 23, 2002 (which all parties agree should be dated April 23, 2004), Defendant alleged that plaintiff breached the Lease by (1) permitting cooking in the premises, (2) causing a violation to be placed on the premises by the New York City Department of Buildings, (3) causing a possible breach of the over-lease, (4) changing the signage without the Defendant's written consent, and (5) making substantial alterations without the Defendant's or the over-landlord's prior written consent. In its Cross Motion, Defendant also maintained that a proper fire suppression system was not in place.[2]

The court held several settlement conferences with the parties, but attempts to resolve

[2]After the motion was submitted, as a result of a violation issued by the New York City Fire Department, the court made two interim orders (12/13/04 and 12/17/04) requiring Plaintiff to cure the outstanding fire violations. Plaintiff then installed a fire suppression system.

this action were unsuccessful. By letter dated March 29, 2005, Plaintiff informed Defendant and the cooperative that the restaurant had stopped cooking and started reheating its food. Defendant contends, by letter dated March 28, 2005, that the commercial kitchen is still in operation.

DISCUSSION

A. Yellowstone Injunction

The purpose of a *Yellowstone* injunction is to allow a tenant confronted by a threat of termination of the lease to obtain a stay by tolling the running of the cure period so that, after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold (see First Natl. Stores v Yellowstone Shopping Ctr., Inc., 21 NY2d 630 [1968]; Long Island Gynecological Servs., P.C. v 1103 Stewart Ave. Assocs. Ltd. Partnership, 224 AD2d 591 [2d Dept 1996]; Garland v Titan West Assocs., 147 AD2d 304 [1st Dept 1989]). Because courts are powerless to revive expired leases, "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 settled in court" (Post v 120 East End Ave. Corp., 62 NY2d 19, 25 [1984]). If, after a determination, the tenant was found to have violated the lease, the tenant could cure the default during the cure period remaining, or, was subject to eviction (id.).

In order to be granted a *Yellowstone* injunction, the commercial tenant 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) it requested injunctive relief prior to the termination of the lease; and (4) it has the desire and ability to cure the alleged defaults by any means short of vacating the premises (see 225 East 36th Street Garage Corp. v 221 East 36th Owners Corp., 211 AD2d 420 [1st Dept 1995]; accord Lexington Ave. and 42nd

Street Corp. v 380 Lexchamp Operating, Inc., 205 AD2d 421 [1st Dept 1994]; Stuart v D&D Assocs., 160 AD2d 547 [1st Dept 1990]). 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 East End Ave. Corp., supra at 25).

The Yellowstone injunction is granted, on the conditions stated herein. Defendant's arguments are unavailing because it is undisputed that Plaintiff has met all four elements to obtain a *Yellowstone* injunction (see Duane Reade v Highpoint Assoc. IX, LLC., 1 AD3d 276 [1st Dept 2003] [trial court reversed for not granting a *Yellowstone* injunction to tenant who subleased part of premises for use as a thrift shop in violation of the lease; tenant established that it held a commercial lease, received a notice of default, timely requested injunctive relief and evidenced its preparedness and ability to cure the default by sending the subtenant a notice of default]; ERS Enterprises, Inc. v Empire Holdings, LLC, 304 AD2d 433 [1st Dept 2003] [plaintiff was entitled to a *Yellowstone* injunction and was entitled to attempt to cure the default alleged against it, which would entail restoration of the leased restaurant to the condition prior to plaintiff's commencement of purportedly unauthorized alterations]; but see Excel Graphics Technologies, Inc. v CFG/AGSCB 75 Nonth Ave. L.L.C., 1 AD3d 65 [1st Dept 2003] [where the tenant sublet the premises without the landlord's consent, in violation of the lease, the *Yellowstone* injunction should have been denied because " there is no issue for future determination"]).[3]

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[3]Excel Graphics Technologies, Inc. appears to be an anomaly.

B. Defendant's Cross Motion

1. For Dismissal of the Complaint

Defendant's Cross Motion to dismiss the complaint is denied. Defendant asserts that the complaint must be dismissed based on the documentary evidence that the Lease was violated (Memorandum of Law in Support of Defendant's Cross-Motion to Dismiss and For Summary Judgment and a Preliminary Injunction and in Opposition to Plaintiff's Motion for a Yellowstone Injunction at 20-22 [Def Mem]). The complaint asserts two causes of action: one for a *Yellowstone* injunction and one for a declaratory judgment that Plaintiff did not violate the Lease.[4] Defendant maintains that the Lease conclusively establishes that Plaintiff "has no right to operate a full service Cuban restaurant at the demised premises, only the Italian style panini shop and coffee bar for which the lease was entered." (Def Mem at 21). Defendant also maintains that Plaintiff violated the Lease by installing a commercial kitchen without its prior written consent and without conforming to the New York City Building and Fire Codes (id). However, the *Yellowstone* injunction should be granted, and in the court's discretion, a declaratory judgment under CPLR 3001 is appropriate.

2. For Summary Judgment and/or a Preliminary Injunction on its Counterclaims

Defendant seeks an order granting it summary judgment and/or a preliminary injunction

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[4]Plaintiff apparently served an undated amended complaint, which is not the subject of the current motions. That amended complaint adds Perry Thompson Third Co. and 110 Thompson St. Owners Corp. as defendants. It also adds a cause of action seeking money damages against Defendant and Perry Thompson Third Co. on the basis that they unreasonably withheld consent to the alterations and adds a cause of action against Defendant and 110 Thompson St. Owners Corp for intentional interference with Plaintiff's Lease.

on its two counterclaims. Defendant's First Counterclaim is for breach of the Lease, and, for an injunction enforcing compliance with the Lease. Defendant's Second Counterclaim seeks attorney's fees, costs and expenses.

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" (Cox v Kingsboro Medical Group, 88 NY2d 904 [1996], quoting Winegrad v New York Univ Med Ctr, 64 NY2d 851, 853 [1985]). The opposing party must then produce evidentiary proof demonstrating that a factual issue exists requiring a trial of the action (see Gilbert Frank Corp v Federal Ins Co, 70 NY2d 966, 967 [1988]; Zuckerman v City of New York, 49 NY2d 557, 560 [1980]).

Defendant contends that it is entitled to summary judgment because Plaintiff breached paragraph 2 of the Lease by "permitting cooking" in violation of the use clause. However, the use clause merely states that tenant "shall use and occupy the demised premises for Sandwich Shop & Coffee Bar with Liquor and for no other purpose." Although the terms "for no other purpose" indicates restrictive language, Defendant has not met its burden to show, as a matter of law, that cooking is in violation of the use clause of the Lease. A variety of sandwiches can be cooked (i.e., a grilled cheese sandwich or a "Cubano" sandwich made of roast pork, ham, and melted cheese). The American Heritage Dictionary, Second Ed., defines cooking as "[t]o prepare for eating by applying heat." Defendant admits that the parties contemplated that Plaintiff would use a panini press or hot plate and a microwave for heating some of the sandwiches (Affidavit in Support of Def Mem at ¶9 and ¶51). The Lease also appears to contemplate cooking because paragraph 10 of the Rules and Regulation state that Plaintiff shall not "cause or permit any odors

of cooking . . . to permeate in or emanate from the demised premises."[5] Accordingly, summary judgment is denied on this issue.

Defendant also contends that it should be granted summary judgment on the basis that Plaintiff breached paragraph 3 of the Lease. It provides that "Tenant shall make no changes in or to the demised premises of any nature without Owner's prior written consent" and that prior to making any such alterations, Plaintiff must "obtain all permits, approvals and certificates required by any government or quasi-governmental bodies." The breach of a covenant not to make alterations is a substantial violation of a lease (see Harar Realty Corp. v Michlin & Hill, Inc., 86 AD2d 182 [1st Dept 1976]).

The court finds that Plaintiff substantially altered the Premises by installing a commercial kitchen, which was unlawfully vented, without Defendant's prior written consent, and without obtaining the necessary building permits, resulting in a violation being placed on the Premises. By letter dated November 21, 2001, the Department of Buildings stated that "any new kitchen Equipment and Fire Protection System must be filed with this Department." The architectural plans attached to the Statement of Responsibility, dated February 19, 2002, signed by the cooperative and Plaintiff's architect and, submitted to the Department of Buildings, did not provide for the kitchen facilities subsequently installed by Plaintiff (nor did it indicate any kitchen at all). Although Plaintiff claims to have received oral approval for these alterations, the Lease provides only for written approval. In making the alterations, Plaintiff failed to comply with the Building Code of the City of New York. Reference Standard 13-3 of the New York City

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[5]Defendant also attempts to use parole evidence to support its contention that the parties agreed that cooking was prohibited (see Affidavit in Support of Def Mem at 3, 10-13, 20-21). Plaintiff disputes such an agreement (see Affidavit of Marco Britti at ¶5 and ¶6).

Building Code, provides, in relevant part, that "[c]ommercial cooking equipment used in processes producing smoke or grease laden vapors and fumes such as from ranges, deep fat fryers, grills, broilers, candy kettles, cruller furnaces and ovens shall be equipped with an independent exhaust system complying with the following: (a) a hood complying with the requirements of Chapter 2, and (b) a duct system complying with the requirements of Chapter 3, and (c) Grease removal devices complying with the requirements of Chapter 4, and (d) fire extinguishing system complying with the requirements of Chapter 7." By letter dated April 9, 2004, Plaintiff's own architect advised Plaintiff that permits were needed to install an exhaust hood, a duct and a fan of the proper size and materials as specified in the Building Code, and to install a fire extinguishing system as specified in the Building Code. An Environmental Control Board violation (no. 34431428R), dated February 12, 2004, was filed against the cooperative for improper venting of the premises as the result of where the exhaust vent terminated. Accordingly, summary judgment is appropriate on this issue.

Defendant, however, has not established that it is entitled to summary judgment based on a violation of Paragraph 45 of the Lease. That paragraph permits a tenant to maintain signs and awnings provided that "[p]rior to the installation of any sign and awning by or for the Tenant, the Landlord's and Over Landlord's prior written consent must be obtained." However, Defendant has not submitted proof that Plaintiff added a canopy and a sign, without obtaining its prior written consent. Nor has Defendant met its burden to show a violation of the Master Lease. Although paragraph 51 of the Lease provides that it is "subject and subordinate to the terms of the Master Lease, and further the Tenant herein agrees to be bound and comply with all of the Terms, conditions and covenants of the Master Lease," Defendant has not established, let alone

cited, what provisions of the Master Lease have been violated.

Defendant has also failed to establish that it is entitled to summary judgment on its Second Counterclaim for legal fees, costs and expenses. No where does the Cross Motion establish why Defendant is so entitled, although the Second Counterclaim alleges that paragraphs 19 and 50 of the Lease entitles Defendant to such relief. Paragraph 19 provides:

> If Tenant shall default in the observance or performance of any term or covenant on Tenant's part to be observed or performed under or by virtue of any of the terms and provisions in any article of this lease, after notice if required and upon expiration of any applicable grace period if any, (except in an emergency), then, unless otherwise provided elsewhere in this lease, Owner may immediately or at any time thereafter and without notice perform the obligation of Tenant thereunder, **and if Owner, in connection therewith or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorney's fees,** in instituting, prosecuting or defending any actions or proceeding and prevails in any such action or proceeding, such sums so paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within ten (10 days) of rendition of any bill or statement to Tenant therefor, and if Tenant's lease term shall have expired at the time of making of such expenditures or incurring of such obligations, such sums shall be recoverable by Owner as damages (emphasis added)

Paragraph 50 provides:

> **Tenant covenants and agrees, at its sole cost and expense, to indemnify, defend and hold Landlord harmless against any and all claims by or on behalf of any person, firm or corporation,** arising out of or in connection with: (a) The conduct or management of, and the payment for, any work or thing whatsoever done in or about the demised premises by or on behalf of Tenant (or any person holding or claiming through or under the Tenant); (b) The condition of the demised premises during the term of this Lease, or any use, non-use, possession, management or maintenance of the demised premises; (c) Any breach or default on the part of Tenant in the performance of any of Tenant's covenants or obligations under this Lease; (d) Any act, negligence or fault of Tenant, or any of its agents, servants, employees, contractors, invitees or licensees or of any person holding or claiming through or under the Tenant; (e) Any accident, injury or damage whatsoever cause to any person, firm or corporation occurring as the result of any work or thing whatsoever done by Tenant (or any person holding or claiming through or under Tenant) in or about the demised premises, or upon or under the street, sidewalks or the land adjacent thereto; (f) Any permits, licenses or certificates required by reason of

> the use and occupancy of the demised premises in accordance with applicable law, regulation, ordinance or code; and (g) Any costs and expense paid or incurred by landlord in obtaining possession of the demised premises after default by Tenant or upon the expiration or sooner termination of this Lease, or in enforcing any of Tenant's obligations or Landlord's rights hereunder. Further, Tenant agrees to indemnify and hold Landlord harmless against and from all costs, counsel fees, expenses and liabilities incurred in or by any such claim or any action or proceeding brought thereon; and in case any action or proceeding shall be brought against Landlord by reason of any such claim, Tenant, upon notice from Landlord, agrees to resist or defend such action at Tenant's sole cost and expense (emphasis added).

Defendant has not established that paragraph 19 was violated because it has not shown that its legal fees, costs and expenses were incurred in connection with its performance of the obligation of Plaintiff under the Lease, or, in connection with any default by Tenant in the covenant to pay rent. Nor has Defendant established that Paragraph 50 was violated because it has not shown that any claim was made against it by, or on behalf of, any person, firm or corporation for which it should indemnified, defended or held harmless.

Defendant's request for an injunction with respect to its First Counterclaim is granted as follows: Plaintiff shall, forthwith, cease cooking to the extent that such cooking would violate the New York City Building or Fire Codes (including but not limited to, Reference Standard 13-3 of the New York City Building Code) and shall, forthwith, remove the ventilation/exhaust system and any commercial cooking equipment used in processes producing smoke or grease-laden vapors and fumes, which requires compliance with Reference Standard 13-3.

It is hereby

ORDERED that plaintiff's motion is for a *Yellowstone* injunction is granted on the condition that Plaintiff comply with the injunction granted in favor of Defendant and on the condition that Plaintiff pay ongoing rent; and it is further

ORDERED that on the condition that Plaintiff comply with the above provision, Defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of Defendant, are enjoined and restrained, during the pendency of this action, from taking any action to cancel or terminate Plaintiff's lease based on the Notice to Cure, dated April 23, 2002 (which all parties agree should be dated April 23, 2004); and it is further

ORDERED that the Cross Motion to dismiss Plaintiff's complaint is denied, summary judgment is granted in favor of Defendant on its First Counterclaim to the extent that the court finds that Plaintiff breached the Lease by making material alterations, without the prior written consent of Defendant and without obtaining the necessary building permits, causing a violation to be placed on the Premises; and it is further

ORDERED that Defendant's request for an injunction with respect to its First Counterclaim is granted as follows: Plaintiff shall, forthwith, cease cooking to the extent that such cooking would violate the New York City Building or Fire Codes (including but not limited to, Reference Standard 13-3 of the New York City Building Code) and shall, forthwith, remove the ventilation/exhaust system and any commercial cooking equipment used in processes producing smoke or grease-laden vapors and fumes, which requires compliance with Reference Standard 13-3; and it is further

ORDERED that each party post a bond in the amount of $50,000 forthwith.

This Constitutes the Decision and Order of the Court.

Dated: April 29, 2005

ENTER: