

John Hollings, Inc. v Nick & Duke LLC

2005 NY Slip Op 30554(U)

April 29, 2005

Supreme Court, New York County

Docket Number: 600636-05

Judge: Rosalyn H. Richter

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

PRESENT: HON. ROSALYN RICHTER
Justice

PART 24

John Holdings Inc

INDEX NO. 600636-05

- v -

Nick & Duke LLC

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED
FILED
MAY 05 2005
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

* PC Scheduled for 5/25/05
AT 10:00 Am

Dated: 4/29/05

[Signature]
HON. ROSALYN RICHTER
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 24

-----X
 JOHN HOLLINGS, INC.,

Plaintiff,

-against-

NICK & DUKE LLC,

Defendant.
 -----X

DECISION AND ORDER
 Index No. 600636-05
 Motion Sequence No. 1

ROSALYN RICHTER, J.S.C.

Plaintiff, who is the tenant of premises located in Manhattan, moves for a *Yellowstone* injunction tolling the time to cure the defaults alleged in defendant landlord's notice to cure dated February 1, 2005, and enjoining the landlord from taking any further action to terminate the lease or evict the tenant from the premises.¹ In the notice to cure, the landlord claimed that the tenant had breached the lease by permitting violations issued by the Department of Buildings and Environmental Control Board to remain uncorrected, and by failing to reconstruct a building which had been destroyed by a fire.

The party requesting a *Yellowstone* injunction must demonstrate that: (1) it holds a commercial lease; (2) it received a notice to cure 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 N.Y.2d 508 (1999); *225 East 36th Street Garage Corp. v. 221 E. 36th Owners Corp.*, 211 A.D.2d 420 (1st Dept. 1995).

The landlord contends that the tenant's *Yellowstone* application, which was brought on February 22, 2005, is untimely because it was brought after expiration of the cure period, which the landlord maintains ended February 11, 2005. The general rule is that a *Yellowstone* application must be brought before the expiration of the cure period stated in the notice to cure. *Daashur Associates v.*

¹ On February 22, 2005, Justice Walter B. Tolub issued a temporary restraining order granting the requested relief until this motion could be decided.

December Artists Apartment Corp., 226 A.D.2d 114 (1st Dept. 1996). However, this rule does not apply where the defaults described in the notice to cure are not capable of complete cure within the time provided in the notice, and where the lease terms require commencement of diligent efforts to cure the defaults within the allotted time. In such a situation, the *Yellowstone* application is timely if the tenant shows that it began such efforts to cure within the stated cure period. *Becker Parkin Dental Supply Company, Inc. v. 450 Westside Partners LLC*, 284 A.D.2d 112 (1st Dept. 2001); *Long Island Gynecological Services P.C. v. 1103 Stewart Avenue Associates Limited Partnership*, 224 A.D.2d 591 (2d Dept. 1996).

The Court concludes that the above exception to the general rule is applicable in this case. The defaults alleged, which involve dozens of building violations and the failure to reconstruct a building, are clearly incapable of being completely cured within the stated cure period. Moreover, the lease provides that “if such [default] is of such a nature that it cannot reasonably be performed within [the cure period], the performance thereof shall be commenced within said period and completed as rapidly as possible thereafter with due diligence and the time for such performance shall be extended accordingly”. The tenant has submitted a letter, dated February 7, 2005, which is within the stated cure period, showing that the tenant began taking steps to retain an architect to resolve the outstanding building violations. The letter specifically refers to a “Proposal for Removal of Building Department Violations at [the subject premises]”, and makes reference to boiler inspection violations, which are included in the landlord’s notice to cure. The Court finds that the tenant commenced its efforts to cure within the cure period, and thus the *Yellowstone* application is timely.²

Finally, the landlord’s contention that the tenant has not shown that it has the ability to cure the alleged default is without merit. The verified complaint, which is attached to the motion, states that the

² In light of this conclusion, the Court need not reach the issue of whether *ATM One v. Landaverde*, 2 N.Y.3d 472 (2004), requires an additional five days to be added to the cure period in commercial non-regulated leases.

tenant is "ready, willing and able to cure such default, and in fact has corrected a number of the conditions raised by [the landlord's] notice to cure." Furthermore, the February 7, 2005 letter indicates that the tenant has contacted an architect to resolve the alleged violations. Thus, the landlord's contention is without merit. Accordingly, it is

ORDERED that plaintiffs' motion for a *Yellowstone* injunction is granted; and it is further

ORDERED that defendant, its attorneys, and all persons and entities known and unknown acting on its behalf or in concert with it, in any manner or by any means, are enjoined and restrained, pending the hearing and determination of this action, from taking any further action, including but not limited to the commencement of legal proceedings, to terminate or cancel the tenant's lease based on the notice to cure dated February 1, 2005, and it is further

ORDERED that the time to cure the alleged defaults set forth in that notice is hereby tolled; and it is further

ORDERED that the parties are to appear for a preliminary conference in Part 24 on May 25, 2005, at 10:00 a.m.

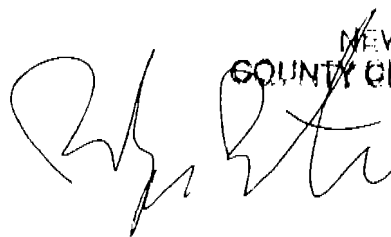
This constitutes the decision and order of the Court.

April 29, 2005

FILED

MAY 05 2005

NEW YORK
COUNTY CLERK'S OFFICE



Justice Rosalyn Richter