

TSI Broadway, Inc. v Broadway 48th -49th St. LLC
2005 NY Slip Op 30556(U)
December 2, 2005
Supreme Court, New York County
Docket Number: 107774/05
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

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TSI BROADWAY, INC.,

Plaintiff,

-against-

BROADWAY 48TH - 49TH STREET LLC,

Defendants.

DECISION/ORDER

Index No. 107774/05

Motion Seq. No. 002

BARBARA R. KAPNICK, J.:

FILED

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NEW YORK
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Plaintiff TSI Broadway, Inc., the operator of a health club on the entire 14th floor and a portion of the 15th floor of the building located at 1605 Broadway, New York, New York, moves by Order to Show Cause for an order:

(1) granting a 'Yellowstone' injunction (see, First Nat. Stores v. Yellowstone Shopping Ctr., 21 N.Y.2d 630 [1968]) enjoining and restraining defendant-landlord, Broadway 48th-49th Street LLC, its general and limited partners, officers, employees, servants, agents, attorneys, affiliates, subsidiaries, corporate parents and all other persons acting on behalf of or in concert with defendant, during the pendency of this action:

(a) from taking any steps to terminate plaintiff's tenancy based on the Notice to Cure dated August 1, 2005 ("the Notice");

(b) from in any manner or by any means taking any action, including but not limited to, the commencement of

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summary proceedings to terminate plaintiff's lease for and/or to oust plaintiff from the subject premises; and

(c) from disturbing in any manner the possession and rights of plaintiff to the premises;

(2) declaring the Notice to be a nullity, without any further force and effect or, in the alternative, staying and tolling the time of plaintiff to cure any default under the lease as alleged in the Notice until such time as this Court has determined that such a default has occurred and plaintiff has been given a sufficient opportunity to cure such default; and

(3) pursuant to CPLR § 3025(b) granting plaintiff leave to amend its Complaint to seek a judgment declaring that plaintiff is not in violation of the Lease as alleged in the Notice and/or that plaintiff has cured the alleged violations of the Lease, and deeming the Amended Complaint served upon defendant.

The Notice alleges that plaintiff is in default of its obligations because: (i) it has failed to deliver to the Landlord copies of its 2003 and 2004 Annual Statements, as required by Section 4.06(h) of the Lease; (ii) "the amount of members of the Club exceeds 5,000 in violation of Section 41.01 of the Lease"; and (iii) it opened the mechanical room on the 14th floor to the electrical room and telephone room, in violation of applicable laws and/or ordinances.

There is no dispute that plaintiff forwarded copies of the requested Annual Reports to the Landlord on September 30, 2005, but defendant contends that the Reports do not conform with section 4.06(h) of the Lease which requires that the statements be "signed and certified to be true and correct by a financial officer, duly authorized, of Tenant" showing, inter alia, "the amount of Gross Revenues during the preceding calendar month, and an itemization of all permitted deductions therefrom". Plaintiff, however, represented that it will expeditiously cure any deficiency.

In addition, it appears that plaintiff has already cured the alleged default regarding the mechanical room by restoring it to its original condition and by installing fire rated doors.

Finally, the parties have a dispute as to the interpretation of section 41.01 of the Lease which limits the Club's membership. Plaintiff contends that it has complied with the lease by keeping the number of "members" of this Club within the required limits. Defendant argues that TSI has failed to abide by the membership limitations of the Lease, and usage has increased dramatically because the majority of TSI's members are "Passport" members who, under the terms of their membership, have unfettered and unlimited access to all TSI health clubs, not only to the club where they are actually a "member". While plaintiff disagrees with defendant's interpretation of the Lease which, in plaintiff's opinion, is not

realistic and asks this Court to expand the meaning of Section 41.01 of the Lease, plaintiff nonetheless represents that it is ready, willing and able to comply with this Lease provision in accordance with any directive of this Court.

Accordingly, based on the papers submitted and the oral argument held on the record on November 9, 2005, plaintiff's motion for a Yellowstone injunction is granted. Defendant is thus enjoined during the pendency of this action from taking any steps to terminate plaintiff's tenancy based on the Notice and from in any manner or by any means taking any action, including but not limited to, the commencement of summary proceedings, to terminate plaintiff's lease for and/or to oust plaintiff from the subject premises.

Plaintiff's time to cure any default under the Lease as alleged in the Notice is, therefore, stayed and tolled pending further order of this Court.

That portion of plaintiff's motion seeking leave to amend its Complaint is granted on consent of defendant. The proposed Amended Complaint, in the form annexed to the moving papers, is deemed served nunc pro tunc as of the date of service of the Order to Show Cause. Defendant shall serve an Answer to the Amended Complaint within 20 days of service of a copy of this order with notice of entry.

A conference to schedule discovery shall be held in IA Part 12, 60 Centre Street, Room 341 on February 1, 2006 at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: December 2, 2005



Barbara R. Kapnick
J.S.C.

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