

812 Washington St., LLC v 95-97 Horatio, LLC

2006 NY Slip Op 30015(U)

October 30, 2006

Supreme Court, New York County

Docket Number: 0602681/2006

Judge: Doris Ling-Cohan

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

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

-----X
812 WASHINGTON ST., LLC,

Index: 602681/06

Plaintiff,

Motion Seq. 001

-against-

DECISION/
ORDER

95-97 HORATIO, LLC,

Defendant.
-----X

Plaintiff is the commercial tenant of the ground floor store located at 812 Washington Street in the building located at 95 Horatio Street, New York, New York ("premises"), pursuant to a written lease dated March 2005, with the prior owner of the building, 95 Horatio LLC. The lease provides for a lease term of ten (10) years.

On or about July 28, 2006, plaintiff commenced this declaratory judgment action against 95-97 Horatio, LLC, the current owner of the building/landlord, alleging that, *inter alia*, the landlord unreasonably withholding its consent to plaintiff's attempt to assign the lease.

Plaintiff has moved by order to show cause for a "Yellowstone injunction", pursuant to *First National Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 NY2d 630 (1968). Specifically, plaintiff seeks an order "(a) [s]taying and tolling the July 31, 2006 termination date set forth in defendant 95-97 Horatio LLC's...Notice of Termination of the parties' Lease, pending the hearing of this action; and (b) [p]reliminarily enjoining and restraining Defendant, its principals, officers, agents and employee, and anyone acting by, through or under Defendant: (i) from terminating or attempting to terminate Plaintiff's Lease and/or tenancy in the subject premises; (ii) from the commencement or attempted commencement of any action or proceeding to evict or eject Plaintiff from the subject premises or terminate Plaintiff's Lease; and (iii) from taking any action, including issuing any notice, to interfere with Plaintiff's possession of the subject premises, on the grounds set forth in the Notice of Termination dated July 21, 2006.

Defendant has cross-moved, pursuant to CPLR §3211, to dismiss the complaint, and pursuant to

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CPLR §6312 directing plaintiff to post a substantial undertaking in an amount to be determined by the Court, but not less than \$100,000.

To obtain a *Yellowstone* injunction, the tenant-movant must show that: (1) it holds a commercial lease; (2) the landlord served upon tenant-movant a notice to cure or notice of defect, or that it faces threat of lease termination; (3) it sought 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 other than vacating the subject premises. *Lexington Ave. & 42nd St. Corp. v. 380 Lexchamp Operating, Inc.*, 205 AD2d 421, 423 (1st Dept 1994); *see also 225 E. 36th St. Garage Corp. v. 221 E. 36th Owners Corp.*, 211 AD2d 420 (1st Dept 1995).

“The purpose of a *Yellowstone* injunction is to maintain the status quo so that the tenant may challenge the landlord’s assessment of its rights without the tenant, during the pendency of the action, forfeiting its valuable property interest in the lease...As such, it may be granted on less than the normal showing required for preliminary injunctive relief...”

Lexington Ave. & 42nd St. Corp. v. 380 Lexchamp Operating, Inc., 205 AD2d at 423; *see also Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc.*, 93 NY2d 508 (1999); *Garland v. Titan West Associates*, 147 AD2d 304 (1st Dept 1989).

Here, plaintiffs have made a sufficient showing to warrant the granting of a *Yellowstone* injunction as conditioned below. Specifically, plaintiff: (1) holds a commercial lease; (2) faces the threat of lease termination in that it received from defendant a notice of termination dated July 21, 2006, which was to take effect July 31, 2006; (3) timely requested injunctive relief prior to the July 31, 2006 effective termination date; and (4) is prepared and maintains the ability to cure the alleged default by a means other than vacating the subject premises, by resuming the operation of the restaurant. *See Terosal Props. v. Bellino*, 257 AD2d 568 (2nd Dept 1999); *Lee v. TT & PP Main St. Rlty., Corp.*, 286 AD2d 665 (2nd Dept 2001). Thus, a temporary injunction is proper to preserve the status quo and prevent the forfeiture of plaintiff’s valuable interest in the leasehold, prior to the adjudication of the parties’ rights. *See Lexington Ave. & 42nd St. Corp. v. 380 LexChamp Operating, Inc.*, 205 AD2d at 424; *Caspi v. Madison 79 Assoc., Inc.*, 85 AD2d

Based upon the above, it is

ORDERED that plaintiff's motion for, *inter alia*, a *Yellowstone* injunction is granted to the extent that the termination date set forth in the subject Notice of Termination is tolled *on condition that*: (1) *within ten (10) days of service of a copy of this order with notice of entry*, plaintiff pays to defendant all rent arrears owed to date; and (2) plaintiff timely pays the monthly rent in accordance with the terms of the lease, throughout the course of this litigation.

It is further


ORDERED that all parties shall appear before this Court for a preliminary discovery conference on Thursday, November 30, 2006, at 10 o'clock a.m., Room 279, 80 Centre Street; and it is further

ORDERED that within ten (10) days of entry of this decision/order, plaintiff shall serve a copy upon defendant with notice of entry.

This constitutes the decision and order of the Court.

Copies of this order shall be supplied to all parties by the Clerk of this Part.

Dated: October 30, 2006



Doris Ling-Cohan, JSC

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Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
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