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

PRESENT: BARBARA R. KAPNICK J.S.C. PART 12

Index Number : 105673/2005
542 HOLDING
vs
PRINCE FASHIONS
Sequence Number : 001
DISMISS ACTION

INDEX NO. 105673/05
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 are

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
AUG 08 2006
NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 8/3/06

BARBARA R. KAPNICK J.S.C.

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: IAS PART 12

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542 HOLDING CORP.,

Plaintiff,

-against-

PRINCE FASHIONS, INC., SILVERADO STAR, INC., FORAVI, INC. FORAVI.COM, INC., "JANE DOE", "JOHN DOE", AAA, CORP., "BBC LLC", "CCC LLP", "DDD PARTNERSHIP",

Defendants.

PREMISES:
STORE/GROUND FLOOR,
BASEMENT AND VAULT
542 BROADWAY
NEW YORK, NEW YORK 10012-3926

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DECISION/ORDER
Index No. 105673/05
Motion Seq. No. 001

BARBARA R. KAPNICK, J.:

This is an action to recover possession of the commercial premises located at 542 Broadway, New York, New York, and for monetary damages.

Plaintiff 542 Holding Corp. a residential cooperative, is the owner in fee of the building. Defendant Prince Fashions, Inc. is the assignee of 542 Equities Associates, the named tenant on the Lease. Defendants Silverado Star, Inc., Foravi, Inc. and Foravi.com, Inc. are subtenants of Prince. The Lease commenced on April 11, 1980 and has an expiration date of April 10, 2079.

Paragraph 17 of the Lease provides, in relevant part, as follows:

> (1) If Tenant defaults in fulfilling any of the covenants of this lease, other than the covenant for the payment of rent or additional rent; ..., then, ... upon Landlord serving a written five (5) days notice upon Tenant specifying the nature of said default and upon the expiration of said five (5) days, if Tenant shall have failed to comply with or remedy such default, ..., then Landlord may serve a written three (3) days notice of cancellation of this lease upon Tenant, and upon the expiration of said three (3) days, this lease and the term thereunder shall end and expire as fully and completely as if the expiration of such three (3) day period were the day herein definitely fixed for the end and expiration of this lease and the term thereof and Tenant shall then quit and surrender the demised premises to Landlord but Tenant shall remain liable as hereinafter provided.
>
> (2) If the notice provided for in (1) hereof shall have been given and the term shall expire as aforesaid; or if Tenant shall make default in the payment of the rent reserved herein or any item of additional rent herein mentioned or any part of either or in making any other payment herein required; then and in any of such events Landlord may without notice, re-enter the demised premises either by force or otherwise, and dispossess Tenant by summary proceedings or otherwise, and the legal representative of Tenant or other occupant of demised premises and remove their effects and hold the premises as if this lease had not been made, and Tenant hereby waives the service of notice of intention to re-enter or to institute legal proceedings to that end...

542 Holding Corp. served upon Prince Fashions a "Demand for Payment of Rent" dated September 4, 2002 (hereinafter referred to as the "Notice to Cure"), which provided as follows:

> PLEASE TAKE NOTICE that pursuant to paragraph 17(1) of the lease (hereinafter, the "Lease") between 542 HOLDING CORP. (the "Landlord") and PRINCE FASHION, INC. ("Prince") dated April 11, 1980, Prince is in violation of substantial obligations of its tenancy and its obligations under the Lease, including that:
>
> > In violation of paragraphs 1 and 43(A), (D) of the Lease, Prince has failed to pay $26,750.66 in rent

to the Landlord representing the unpaid rent for the period January, 1994 through August, 2002 as follows:

1994 (January through December)	$ 1,669.00
1995 (January through December)	2,075.00
1996 (January through December)	2,430.00
1997 (January through December)	3,600.00
1998 (January through December)	2,160.00
1999 (January through December)	1,300.00
2000 (January through December)	1,100.00
2001 (January through December)	7,450.00
2002 (January through August)	4,966.66
Total Rent Due	$26,750.66

PLEASE TAKE FURTHER NOTICE, that Prince has failed to pay monthly rent increases since January, 1994, after being provided with an accounting of relevant expenses pursuant to paragraph 43(C) of the Lease, and

PLEASE TAKE FURTHER NOTICE, that pursuant to paragraph 17(1) of the Lease, Prince is hereby required to cure and correct the above mentioned defaults and pay the $26,750.66 owed in rent and additional rent within five (5) days of receipt of this notice to cure, and that upon any failure by Prince to cure said defaults on a timely basis, the Landlord will cancel the Lease, terminate all tenancies thereunder and commence summary proceedings in Civil Court of the City of New York to recover possession of the subject premises.

542 Holding Corp. subsequently served a notice dated September 10, 2002 (hereinafter referred to as "Notice of Cancellation"), signed by its President, Peter R. Douglas, notifying Prince Fashions that "[p]ursuant to paragraph 17 of the lease (hereinafter, the 'Lease') between 542 Holding Corp. (the 'Landlord') and Prince Fashion, Inc. ('Prince') dated April 11, 1980, and the Demand for Rent dated September 4, 2002 previously delivered to Tenant as provided in the Lease, the Landlord hereby exercise its right to cancel the Lease."

Prince Fashions moved by Order to Show Cause in a prior action, Prince Fashions, Inc. v. 542 Holding Corp., Index No. 120149/02, for a preliminary injunction pursuant to First National Stores v. Yellowstone Shopping Center, 21 N.Y.2d 630 (1968) ("*Yellowstone* injunction"), enjoining 542 Holding Corp., its agents and employees and all persons acting in concert with them from taking any steps pursuant to the September 4, 2002 Notice to Cure to (i) terminate the subject Lease, (ii) interfere with Prince Fashions' tenancy of the subject premises, or (iii) attempt to recover possession of the subject premises.

The Order to Show Cause, signed by this Court on September 11, 2002, contained a temporary restraining order ("TRO") restraining and enjoining 542 Holding Corp. its agents and employees and all persons acting in concert with them from "taking any steps pursuant to the Notice to Cure dated September 4, 2002 (i) to terminate the Lease, (ii) to interfere with [Prince Fashions'] tenancy of the subject premises or (iii) to attempt to recover possession of the subject premises;" and tolling "the time for [Prince Fashions] to cure any alleged defaults referred to in [542 Holding Corp.'s] Notice to Cure dated September 4, 2002".

542 Holding Corp. opposed the motion on the grounds, inter alia, that Prince Fashions failed to seek a restraining order prior to the expiration of the cure period, thereby divesting the Court

of its power to grant a *Yellowstone* injunction. Prince Fashions claimed that it timely sought a restraining order because 542 Holding Corp.'s counsel orally agreed to extend the cure period through September 12, 2002, but 542 Holding Corp.'s counsel denied agreeing to such an extension.

By Decision/Order dated October 3, 2002, this Court referred the issue of whether or not the cure period had been extended through September 12, 2002 to a Special Referee to hear and report with recommendations.

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 finding that Prince Fashions had failed to demonstrate by a preponderance of the evidence that 542 Holding Corp.'s counsel orally agreed to extend the cure period through September 12, 2002.

By Decision/Order dated July 7, 2004, this Court, inter alia, confirmed the Special Referee's Report and denied Prince Fashion's motion for a *Yellowstone* injunction on the ground that the time to cure expired on September 10, 2002, prior to Prince Fashions' submission of its Order to Show Cause to toll the running of the cure period.

On July 12, 2004, the Appellate Division, First Department granted Prince Fashions an interim stay continuing this Court's TRO pending determination of Prince Fashions' motion for a stay pending its appeal of this Court's July 7, 2004 Decision/Order, and on August 26, 2004, the Appellate Division granted a stay of this Court's Decision pending the hearing and determination of the appeal.

By Decision/Order dated February 8, 2005, the Appellate Division, First Department, affirmed that portion of this Court's Decision denying a *Yellowstone* injunction, and found based on the record before it, that the equities did not "favor the avoidance of a forfeiture of this commercial tenancy."[1]

542 Holding Corp. thereafter commenced the instant action seeking ejectment on two alternative grounds.

In the first cause of action, 542 Holding Corp. seeks a judgment of possession based on its contention that, pursuant to paragraph 17(1) of the Lease, the Lease was cancelled three days

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[1] The Appellate Division, First Department *reversed* another portion of the Decision/Order in which the Court declined to bar any and all claims concerning 542 Holding Corp.'s failure to provide plaintiff with an accounting for the years 1996 to 1998, finding that those claims were barred by the doctrine of *res judicata* because Prince Fashions had withdrawn its accounting claims for those years with prejudice in a prior action.

after delivery of the Notice of Cancellation dated September 10, 2002.

In the fourth cause of action, 542 Holding Corp. alternatively seeks an order of ejectment and a judgment of possession pursuant to paragraph 17(2) of the Lease based on Prince Fashions' alleged default in the payment of rent, as well as damages incurred by 542 Holding Corp. during the period of Prince Fashions' alleged holdover of the premises.

The Complaint also seeks to recover unpaid rent through at least August 2002 (second cause of action), use and occupancy for the period commencing September 15, 2002, when 542 Holding Corp. claims the lease was terminated pursuant to its Notice of Cancellation, through the commencement of this action on April 25, 2005 (third cause of action) and attorney's fees and other expenses pursuant to the Lease (fifth cause of action).

Defendants now move for an order pursuant to CPLR § 3211(a)(7) dismissing this action on the grounds that: (i) the underlying Notice to Cure is defective: (ii) those claims which accrued prior to April 25, 1999 are barred by the applicable six-year Statute of Limitations; and (iii) the Notice of Cancellation was premature.

Plaintiff opposes the motion and cross-moves for partial summary judgment determining that: (a) the Notice to Cure is

legally sufficient and valid; (b) the claims for rent set forth in the Notice to Cure for the years 1996 and thereafter are timely and not barred by the Statute of Limitations; (c) the Notice of Cancellation is legally sufficient and valid; (d) the Lease between plaintiff and defendant Prince expired pursuant to the Notice of Cancellation if it is determined that Prince Fashions owed any rent to 542 Holding Corp.; and (e) alternatively, if Prince Fashions owed any rent as of April 25, 2005, the Lease terminated no later than the commencement of this action.[2]

Notice to Cure

Defendants argue that the underlying Notice to Cure is defective because (a) the Notice to Cure contains a claim for additional rent which allegedly became due in 1994 and 1995, that is barred by the applicable six year statute of limitations; (b) the Notice to Cure does not indicate when accountings were served, if ever;[3] (c) the Notice to Cure claims a default and seeks

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[2] Defendants correctly point out that 542 Holding Corp.'s cross-motion for summary judgment is premature since issue has not been joined, except as to one of the subtenant defendants. However, this Court must determine the validity of the Notice to Cure and Notice of Cancellation in connection with its determination of defendants' motion to dismiss the Complaint. Moreover, 542 Holding Corp. has moved for the identical relief under motion sequence number 005 in the *Yellowstone* action (Index No. 120149/02), in which issue has already been joined. Therefore, the relief sought in 542 Holding Corp.'s cross-motion for partial summary judgment shall be addressed herein.

[3] Pursuant to paragraph 42 of the Lease, "[t]he annual rental rate after the first year of the lease will be 19.99% of the net expenses, as defined in paragraph 43D, of the most recent calendar year for which an accounting of the Corporation's expenses has been delivered to the Tenant."

additional rent for 2001 and 2002 even though the 30 day period from delivery of a purported accounting on or about August 12, 2002 had not elapsed when the Notice to Cure was served, as required by paragraph 43 of the Lease; and (d) the Notice to Cure claims defaults and seeks additional rent without specifying when these sums became due or when the necessary accountings were allegedly delivered by 542 Holding Corp. to Prince Fashions.

The defendants contend that the Notice to Cure thus failed "to specifically apprise the tenant of claimed defaults in its obligations under the lease and of the forfeiture and termination of the lease if the claimed default is not cured within a set period of time." Filmtrucks, Inc. v. Express Indus. & Terminal Corp., 127 A.D.2d 509, 510 (1st Dep't 1987). See also, Garland v. Titan West Associates, 147 A.D.2d 304 (1st Dep't 1989).

Defendants argue that this Court should thus find that the entire notice is invalid. See, 200 West 58th St. LLC v. Little Egypt Corp., 7 Misc. 3d 1017(A) (Civ. Ct., N.Y. Co. 2005) in which the Court held that

> the partial validation of a notice to cure containing any substantive deficiency finds no support anywhere in the law. To provide that support would give landlords license to issue notices containing one sufficient charge and cure among a myriad of unfathomable charges and cures, in the hope that one might stand up, and meanwhile placing tenants in the unnecessarily precarious and untenable position of simply not knowing what to do to maintain their tenancy.

supra at *** 3; see also, 603-607 Realty Assoc. v. Etienne, New York Law Journal, August 26, 2005, p. 20, col. 3 (Civ. Ct., Kings Co.) (Pinckney, J.).

542 Holding Corp., on the other hand, argues that whether or not it is ultimately able to prove that defendants owe all the rent alleged in the Notice to Cure does not affect the validity of the notice, since - unlike the situation presented in 200 West 58th St. LLC v. Little Egypt, supra - the notice clearly notified defendant how to avoid termination of the lease, i.e, by paying the amount allegedly owed.

> It is well settled that a proper demand for rent
>
> must fairly afford the tenant, at least, actual notice of the alleged amount due and of the period for which such claim is made. At a minimum, the landlord or his agent should clearly inform the tenant of the particular period for which a rent payment is allegedly in default and of the approximate good faith sum of rent assertedly due for each such period.

Schwartz v. Weiss-Newell, 87 Misc.2d 558, 561 (Civ. Ct., N.Y. Co. 1976). See also, Shoprite Supermarkets, Inc. v. Yonkers Plaza Shopping, LLC, 29 A.D.3d 564 (2nd Dep't 2006); 603-607 Realty Associates v. Etienne, supra.[4]

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[4] The Court in 603-607 Realty Associates, supra, noted that "[t]he purpose of a rent demand is not only to inform the tenant that an eviction proceeding will be commenced if payment is not made, but to allow the tenant an opportunity to make payment as required by the demand. If the demand is inaccurate, the tenant is not in a position to remedy the default and make payment."

It has been held that "the degree of specificity required in a Notice to Cure alleging non-payment of rent should be, if anything, more stringent than that required in a Demand for Rent" (Trustees of the Masonic Hall and Asylum Fund v. Limerick House, Inc., New York Law Journal, July 18, 2005, p. 17, col. 1 [Civ. Ct., N.Y. Co.] [Gesmer, J.]),[5] and "must provide the tenant actual notice of the alleged amount due, the period for which the alleged rent is due, whether the amount sought is for base rent or additional rent, and the provisions of the lease on which the claim for rent is based" (Id.).

Based on the papers submitted and the oral argument held on the record on November 23, 2005, this Court finds that the September 4, 2002 Notice to Cure does not comply with these minimum requirements, since it fails to delineate between the base rent and additional rent and/or to specify with particularity when the rent became due.

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[5] Judge Gesmer noted that "[w]here a landlord serves a Demand for Rent and then brings a nonpayment proceeding, the tenant is given an opportunity after the entry of judgment to avoid eviction by paying the landlord the amount of the rent determined to be due (citations omitted). In contrast, where, as in this case, the landlord has the option of bringing a holdover proceeding if the tenant fails to pay any alleged rent due after service of a Notice to Cure, the tenant has no means of avoiding eviction once judgment has been entered. That is because the Court lacks authority to reinstate the tenancy if it finds that the landlord had proper grounds for termination. (*First Nat'l Stores, Inc. v. Yellowtone Shopping Center, Inc.*, 21 NY2d 630 [1968])."

Notice of Cancellation

Defendants argue that the Notice of Cancellation dated September 10, 2002 was premature and thus invalid, because it was served prior to the expiration of the cure period at 11:59 p.m. on September 10, 2002. See, Chumley's Bar and Restaurant Corp. v. Bedford Court Associates, 174 A.D.2d 398 (1st Dep't 1991), in which the Court found a notice to terminate a lease to be ineffective on the ground that it was served one day prior to the expiration of the five day cure period mandated under the lease; and A. Dubois & Son, Inc. v. Goldmith Bros., 273 A.D. 306 (1st Dep't 1948), in which the Court found that a notice to exercise an option to terminate a lease was ineffective because it was served prior to the period mandated under the lease.

542 Holding Corp. argues that the Notice of Cancellation was not premature because Mr. Douglas served the notice by personal delivery on September 11, 2002 at 12:01 a.m., immediately after the expiration of the five-day cure period.

However, Mr. Douglas represents in an Affidavit of Service sworn to on September 25, 2002, that he also mailed copies of the Notice of Cancellation by certified mail, return receipt requested on September 10, 2002, between 8 and 9 p.m., and by express mail also on September 10, 2002.

Pursuant to paragraph 27 of the Lease,

> 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 the time when the same is delivered to Tenant, mailed, or left at the premises as herein provided* (emphasis supplied).

Thus, although none of the copies of the notice were received by Prince prior to September 11, 2002, the Notice of Cancellation must be deemed to have been served at the time it was mailed, i.e., on September 10, 2002, prior to the expiration of the cure period.

Thus, this Court finds that the Notice of Cancellation was premature and, accordingly, invalid.

That portion of the motion seeking to dismiss the first cause of action seeking ejectment pursuant to paragraph 17(1) of the Lease, which is contingent upon the service of valid predicate notices must, therefore, be granted.[6]

Those portions of the cross-motion seeking a determination that the Notice to Cure and the Notice of Cancellation are legally sufficient and valid, and that the Lease expired pursuant to the Notice of Cancellation, are denied.

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[6] The third cause of action is also dismissed to the extent that it alleges that the Lease was terminated pursuant to the Notice of Cancellation.

Defendants further argue that since the predicate notices were not effective, the fourth cause of action for ejectment must also be dismissed. See, Prana Growth Fund I, L.P. v. Lazala, 8 Misc.3d 667 (Sup. Ct., N.Y. Co. 2005), in which *this* Court dismissed an action for ejectment on the ground that the landlord had failed to serve a notice of termination.

542 Holding Corp., however, argues that its fourth cause of action seeking ejectment pursuant to paragraph 17(2) of the Lease is not contingent upon the service of a valid predicate notice, since Prince Fashions expressly and unambiguously waived service of a notice of intention to re-enter or to institute legal proceedings in cases involving a default in the payment of rent. See, Queen Art Publishers, Inc. v. Animazing Gallery, Inc., 2002 WL 452207 (Civ. Ct., N.Y. Co. 2002) (Rakower, J.), in which the Court upheld a substantially similar, if not identical, lease provision, noting that "[c]ommercial landlords and tenants can freely waive or modify their rights and obligations unless doing so is illegal, unconscionable or against public policy." supra at *3.

The Court further noted that while the language of paragraph 17(2) of the lease may have precluded the tenant in that case from utilizing "defensive tactics such as seeking a *Yellowstone* injunction prior to the expiration of the lease, it was part of the fully negotiated contract between represented parties" (Id at *3), and that "[i]t would not be contrary to public policy to enforce

the provisions of the lease under [those] circumstances (citation omitted)" (Id.).

Likewise, this Court finds that it would not be contrary to public policy to enforce the provisions of paragraph 17(2) of the Lease in this case, which is distinguishable on its facts from Prana Growth Fund I, L.P. v. Lazala, supra, which involved a rent stabilized residential lease containing no similar provision.

Therefore, that portion of the motion seeking to dismiss the fourth cause of action for ejectment is denied, and that portion of the cross-motion seeking a determination that the lease terminated pursuant to paragraph 17(2) of the Lease if Prince is found to have owed any rent as of the date of the commencement of this action, is granted.[7]

Finally, defendants argue that 542 Holding Corp.'s claims for rent accruing more than six years prior to the commencement of this action on April 25, 2005, are time-barred and must be dismissed.

542 Holding Corp. opposes this portion of the motion and cross-moves for a determination that the claims for rent for the years 1996 and thereafter are timely and not barred by the statute of limitations, because its time to bring an ejectment action was

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[7] Counsel for 542 Holding Corp. reiterated on the record at the oral argument that it is not asking this Court to rule, at this time, on the issue of whether or not Prince Fashions owes rent, because there are factual issues relating thereto to be determined at trial.

tolled pursuant to the temporary restraining order granted by this Court September 11, 2002, and the subsequent stays issued by the Appellate Division, First Department.

Defendants argue that 542 Holding Corp. was never stayed by either this Court or by the Appellate Division from commencing a non-payment proceeding.

However, this Court specifically tolled Prince Fashions' time "to cure any alleged defaults referred to in" the Notice to Cure; i.e., its alleged default in the payment of rent from January 1994 through August 2002. Thus, 542 Holding Corp. was, in fact, precluded from commencing a non-payment proceeding or an action for ejectment during the period that the TRO and subsequent stays were in effect.

Accordingly, this portion of defendants' motion is denied, and that portion of 542 Holding Corp.'s cross-motion seeking a determination that all claims for rent accruing after 1996 are timely, is granted.

Defendants shall serve an Answer to 542 Holding Corp.'s Complaint (with the exception of the first cause of action) within 20 days of service of a copy of this Order with notice of entry.

A preliminary conference shall be held in IA Part 12, 60 Centre Street, Room 341 on September 27, 2006 in order to coordinate all outstanding discovery.

This constitutes the decision and order of this Court.

Dated: August 3, 2006

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.