

**Faith Enterprises D.C. LLC v Gyrodyne Co. of  
Am., Inc.**

2007 NY Slip Op 30120(U)

February 21, 2007

Supreme Court, Suffolk County

Docket Number: 0003511

Judge: Edward D. Burke

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SUPREME COURT - STATE OF NEW YORK
IAS/TRIAL PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. EDWARD D. BURKE
Acting Justice of Supreme Court

Motion R/D : 02/14/07
Adj. Date : None
Mot Seq # : 001 MD

FAITH ENTERPRISES D.C. LLC,

Plaintiff(s),

- against -

DODGE & DODGE, ESQS.

Attorneys for Plaintiff(s)
175 Pinelawn Road, #105
Melville, New York 11747

GYRODYNE COMPANY OF AMERICA, INC.,

Defendant(s).

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Upon the following papers numbered 1 to 6 read on this motion by the plaintiff for preliminary injunctive relief; Notice of Motion/Order to Show Cause and supporting papers 1 to 3; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 4 to 5; Replying Affidavits and supporting papers; Other 6 - stipulation extending temporary restraining order; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (#001) by the plaintiff for an order awarding it preliminary injunctive relief is decided as follows:

Plaintiff commenced<sup>1</sup> this action against the defendant to recover money damages by reason of the defendant's purported breach of a commercial lease, its fraud in inducing the plaintiff to enter into said lease and its purportedly tortious conduct in interfering with the plaintiff's contracts with its franchisor and/or customers.

The plaintiff's claims for damages against the defendant arise out of a fifteen (15) year commercial lease which the parties executed in March of 2005. Pursuant to the terms thereof, the defendant leased to the plaintiff a portion of a commercial building owned by the defendant. The plaintiff intended to occupy the leasehold for purposes of conducting a day-care center franchised by a non-party to this action. After execution of said lease, the plaintiff entered upon the leasehold and began operating its franchised day-care center.

<sup>1</sup>The court is without proof that service of the summons and complaint was effected upon the defendant in a manner consistent with the requirements of CPLR 311.

By writing dated July 10, 2006, the defendant served plaintiff with a notice of default indicating that the plaintiff was in default in the payment of rent due under the terms of the lease and that plaintiff's rent arrears, which began to accrue in July of 2005, were in excess of \$60,000.00. Although the parties attempted to resolve the issue of plaintiff's rent arrears, all such attempts were unsuccessful. On November 21, 2006, the defendant served a second notice of default upon the plaintiff advising that its rent arrears then totaled \$72,927.75 and that the defendant would forebear termination of the lease and the commencement of proceedings against the plaintiff for a period of thirty (30) days from receipt of said notice to afford the plaintiff time to cure its default in payment of rent. On February 6, 2007, the defendant served plaintiff with a "ten day notice" advising the plaintiff to surrender possession of the leasehold unless, within three (3) days of service of said notice, the plaintiff paid the defendant the rent arrears totaling \$90,906.62

On February 9, 2006, the plaintiff interposed this motion (#001) by presentation of an order to show cause to the Honorable Emily Pines, J.S.C. Justice Pines issued said order after modification of various provisions proposed by the plaintiff and temporarily stayed the defendant from commencing "non-payment proceedings" against the plaintiff and the expiration of the plaintiff's three day cure period under the February 6, 2007 "ten day notice" served by the defendant. On the February 14, 2007 return date of the instant motion, the parties stipulated to extend the temporary restraining order issued by Justice Pines through February 28, 2007 and to the submission of the instant motion (#001) to this court for determination. Said stipulation was so-ordered on February 14, 2007 by the the Honorable William B. Rebolini, J.S.C.

The preliminary injunctive relief demanded by the plaintiff on this motion is twofold in nature. The plaintiff first demands a *Yellowstone* injunction enjoining and restraining the defendant from commencing "a nonpayment proceeding" pending further order of this court (see, *First National Stores v Yellowstone Shopping Center*, 21 NY2d 630, 290 NYS2d 721). The plaintiff further demands preliminary injunctive relief restraining and enjoining the defendant from undertaking any action to re-zone and re-develop the real property on which the plaintiff's leasehold sits and from commenting publicly, in the press or otherwise, on any of its plans to re-zone its property and re-development same in accordance with such re-zoning. For the reasons set forth below, the instant motion is, in all respects, denied.

It is well established that the purpose of a *Yellowstone* injunction is to enable a tenant confronted with a notice of default, notice to cure or threat of termination of the lease to obtain a stay tolling the running of the cure period so that a determination of the merits of the alleged defaults which underlie the landlord's notices of default and/or cure may be made by the courts prior to forfeiture of the leasehold (*Purdue Pharma v Ardsley Partners, LP*, 5 AD3d 654, 774 NYS2d 540, and the cases cited therein). To obtain a *Yellowstone* injunction the tenant need only demonstrate the following: (1) that it holds a commercial lease; (2) that it has received from the landlord a notice of default, a notice to cure, or a threat of termination of the lease; (3) that its application for a temporary restraining order was made prior to the termination of the lease; and (4) that it has the desire and ability to cure the alleged default by any means short of vacating the premises (*Purdue Pharma v Ardsley Partners, LP, supra*).

Contrary to the contention of the defendant, issuance of a *Yellowstone* injunction is not precluded merely because the tenant's default under the lease which precipitated the landlord's issuance of a notices of default and/or cure is predicated solely upon said tenant's nonpayment of rent (*3636 Greystone Owners, Inc. v Greystone Building*, 4 AD3d 122, 771 NYS2d 341). Where, as here, the landlord (defendant) served the tenant with a notice to cure and/or notice of default alleging that the nonpayment of rent constituted a breach of a substantial lease term, for which termination of said lease is a remedy available to the landlord prior to adjudication of any disputes with respect to said nonpayment, issuance of a *Yellowstone* injunction is an available remedy to the tenant (*Purdue Pharma v Ardsley Partners, LP, supra; Lexington Avenue & 42<sup>nd</sup> Street Corp v. 380 Lexchamp Operating, Inc.*, 205 AD2d 421, 613 NYS2d 402). Only where the landlord has served the tenant with a notice of *nonpayment* pursuant to RPAPL 711(2) as a condition precedent to a commencement of a nonpayment proceeding is the issuance of a *Yellowstone* injunction precluded since the tenant may cure its own default and prevent termination of the lease by paying all rent due into court pursuant to RPAPL 751(1) (*MBS Love Unlimited, Inc. v Jaclyn Realty Associates*, 215 AD2d 537, 626 NYS2d 504; *Hollymount Corporation v Modern Business Associates, Inc.*, 140 AD2d 410, 528 NYS2d 113).

Nevertheless, a *Yellowstone* injunction is not an available remedy to the plaintiff in this action. While the plaintiff's moving papers established that it is the holder of a commercial lease and as such, had received from the defendant landlord notices of default and notices to cure, each containing a threat of termination of the subject lease by the defendant, and that the plaintiff interposed this application prior to any such termination of the lease, the plaintiff's moving papers failed to demonstrate that it has the ability to cure the alleged default by any means short of vacating the premises. Review of the moving papers submitted by the plaintiff reveal that none of the plaintiff's members and/or authorized agents have disputed that the plaintiff is in arrears in the payment of rent as alleged by the defendant landlord in its notices of default and cure. Nor do the moving papers include evidence of any willingness or ability on the part of the plaintiff to cure its default by the payment of all rent due to the defendant under the terms of the lease.

In addition, *Yellowstone* injunctions, by which tenants are permitted to contest the validity of the defaults set forth in their landlords' notices of default and cure, issue out of actions wherein the tenant seeks a judgment challenging the landlord's asserted right to cancel the lease by reason of a substantial default by the tenant and declaring the rights of the parties under the terms of said lease. Here, the plaintiff commenced this action for a judgment awarding money damages under theories of tort and contract law. The plaintiff's complaint does not include challenges to the defendant's claim that it is entitled to terminate the lease due to the plaintiff's nonpayment of rent and the failure of the plaintiff to cure rent arrears as demanded by the defendant in its notices of default and cure. There are no pleaded demands for a judicial declaration that the lease is not subject to termination because the plaintiff is not in breach of its obligation to pay rent under the terms of said lease as alleged by the defendant or otherwise (*cf., Purdue Pharma v Ardsley Partners, LP, supra*). Nor are there any allegations that the claims interposed in this action by the plaintiff, which are limited to demands for the recovery of money damages, would in any way be prejudiced by the

defendant's cancellation of the lease and/or its commencement of summary proceedings to evict the plaintiff (*see, Buckingham Badler Associates, Inc. v Best Equities, LLC*, 12 Misc3d 1161(A), 819 NYS2d 208; *see, also, Magno Sound, Inc. v 729 Acquisition, LLC*, 12 Misc3d 1152(A), 819 NYS2d 210). Plaintiff's application for a *Yellowstone* injunction is thus denied.

Plaintiff's further demands for a preliminary injunction restraining an enjoining the defendant from undertaking any action to effect a re-zoning of the real property on which the plaintiff's leasehold sits and a re-development of said property in accordance with any such re-zoning or otherwise and enjoining the defendant from publicly commenting on its re-zoning and re-development plans are denied.


Preliminary injunctive relief is available to a party to an action only in the following two circumstances: (1) where the movant has commenced an action and effected the jurisdictional service of process with notice or pleadings demanding permanent injunctive relief (*see, Glover v Coughlin*, 203 AD2d 846, 612 NYS2d 967) and therein moves provisionally to enjoin, during the pendency of said action, that which the movant seeks to enjoin permanently; or (2) where the movant commenced an action and effected the jurisdictional service of process with notice or pleadings (*see, Glover v Coughlin, ibid*) and therein seeks provisional relief with respect to a particular "subject matter" of said action because the non-moving party threatens or is about to do an act with respect to said "subject matter" which would render a judgment in favor of the movant ineffectual (CPLR 6301). The within action by the plaintiff is not within the contemplation of CPLR 6301, as it is not one for permanent injunctive relief nor one concerning a particular "subject matter", over which, the defendant has access and control, and with respect to which, the defendant has threatened to sell, remove, transfer, harm, impair, conceal or destroy same thus rendering any judgment in favor of the plaintiff, ineffectual.

In addition, it is well established that to prevail on a motion for preliminary injunctive relief, the movant must demonstrate a likelihood of success on the merits, danger or irreparable harm unless the injunction is granted, and that a balancing of the equities favors the movant (*Grant Co. v Srogi*, 52 NY2d 496, 438 NYS2d 761; *Family Affair Haircutters v Detling*, 110 AD2d 745, 488 NYS2d 204). The decision to grant a preliminary injunction is committed to the sound discretion of the court (*Bergen-Fine v Oil Heat Institute, Inc.*, 280 AD2d 504, 720 NYS2d 378), as the remedy is considered to be a drastic one (*Doe v Axelrod*, 73 NY2d 748, 536 NYS2d 44). A clear legal right to relief which is plain from undisputed facts must be established (*Blueberries Gourmet v Avis Realty*, 255 AD2d 348, 680 NYS2d 557) and the burden of showing an undisputed right to the injunction rests with the movant (*Doe v Poe*, 189 AD2d 132, 595 NYS2d 503). Factors militating against the granting of preliminary injunctive relief include: that the movant can be fully recompensed by a monetary award or other adequate remedy at law (*White Bay Enterprises v Newsday, Inc.*, 258 AD2d 520, 685 NYS2d 257) and that the granting of the requested injunctive relief would confer upon the plaintiff the ultimate relief requested in the action or effect an alteration, rather than a preservation of the *status quo* (*McIntyre v Metropolitan Life Insurance Company*, 221 AD2d 602, 634 NYS2d 180 and the cases cited therein; *Rosa Hair Stylists, Inc. v Jaber Food Corp.*, 218 AD2d 793, 631 NYS2d 167).

Upon the application of the foregoing principles to the facts adduced on the instant motion, the court finds that the plaintiff failed to establish its entitlement to the preliminary injunctive relief demanded by it pursuant to CPLR Article 63. As indicated above, the within action is one in which the plaintiff demands money damages by reason of the defendant's conduct which the plaintiff claims is actionable under theories of tort and contract law. It is thus apparent that the plaintiff has an adequate remedy at law, namely, the recovery of money damages in the event that it should prevail on its pleaded claims against the defendant. The plaintiff thus failed to demonstrate that it would suffer irreparable harm if the preliminary injunctive relief demanded was denied (*1659 Ralph Avenue Laundromat Corp. v. Ben David Enterprises, LLC, supra*; *Neos v Lacey*, 291 Ad2d 434, 737 NYS2d 394; *White Bay Enterprises, Ltd. v Newsday, Inc., supra*; *Schrager v Klein*, 267 AD2d 296, 699 NYS2d 880). In addition, the plaintiff failed to establish a likelihood of success on the merits on its pleaded claims or that a balance of the equities favors its position as the expansive preliminary injunctive relief demanded, including plaintiff's demands for prior restraint of the defendant's speech and expressions of opinion, are wholly unrelated to the plaintiff's pleaded claims for relief in this action. Moreover, the defendant's speech and expressions of opinion are constitutionally protected and the plaintiff failed to demonstrate any entitlement to curtailment thereof by prior restraint or otherwise (*Nebraska Press Association v Stuart*, 427 US 539, 965 S.Ct. 279; *Rosenberg Diamond Development Corp. v Appel*, 290 AD2d 239, 735 NYS2d 528).

In view of the foregoing, the instant motion (#002) by the plaintiff for preliminary injunctive relief is denied. The temporary restraining order contained in the February 9, 2007 order to show cause by which this motion was interposed (Pines, J), which was subsequently extended by the so-ordered stipulation of February 14, 2007 (Rebolini, J.), is hereby lifted and vacated.

Dated: February 21, 2007.




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EDWARD D. BURKE, A.J.S.C.