

Yetim v 502F Realty Corp.

2007 NY Slip Op 30489(U)

March 9, 2007

Supreme Court, Suffolk County

Docket Number: 0032403/2006

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12/5/06
ADJ. DATES 12/8/06
Mot. Seq. # 001 - Mot D

-----X
GULSIN YETIM, :
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 Plaintiff, :
 :
 :
 -against- :
 :
 502F REALTY CORPORATION, :
 :
 Defendant. :
 :
-----X

WILLIAM R. GARBARINO, ESQ.
Atty. For Plaintiff
P.O. Box 717
Sayville, NY 11782

HAYT, HAYT & LANDAU, LLP
Attys. For Defendant
1600 Stewart Ave.
Westbury, NY 11590

Upon the following papers numbered 1 to 10 read on this motion for a preliminary injunction
_____ ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice
of Cross Motion and supporting papers _____ ; Answering Affidavits and supporting papers 5-9
_____ ; Replying Affidavits and supporting papers _____ ; Other 4 (memorandum); 10 (memorandum) ; (and
~~after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this application by plaintiff for a preliminary injunction enjoining and restraining the defendant, its agents, servants and employees, from terminating plaintiff's leasehold interest or lease and enjoining and restraining defendant from commencing any summary proceeding to terminate or cancel the lease on the premises known as 1741 Montauk Highway, Bellport, New York 11735, during the pendency of this action, based upon the notice of default served upon plaintiff on November 15, 2006, is granted to the extent that plaintiff is directed to (1) pay defendant the regular monthly base rent for the months of September 2006, October 2006 and November 2006 within 15 days of the date of service of a copy of this Order with Notice of Entry upon plaintiff, which payments are exclusive of the disputed rental amounts charged by defendant for the aforementioned calendar months; (2) continue paying the regular monthly base rent to defendant as it becomes due and owing, on the first day of each month; and (3) file an undertaking pursuant to CPLR 6312 in the amount of \$150,000.00 within 45 days of the date of service of a copy of this Order with Notice of Entry upon plaintiff, in the form of a bond from a surety licensed to do business in the State of New York; and it is further

ORDERED that in the event it is determined that plaintiff was not entitled to the injunction granted herein, then plaintiff shall pay to defendant all damages and costs it sustained by reason of this injunction; and it is further

ORDERED that all aforementioned payments of rent shall be without prejudice to the rights of either party; and it is further

ORDERED that, upon obtaining the bond as indicated above, plaintiff is directed to serve a true copy of same upon the Court and the defendant; and it is further

ORDERED that in the event plaintiff fails to pay any of the regular monthly base rent to defendant for the months of September 2006, October 2006 and November 2006, as indicated above, then and in that event, upon receipt by the Court of an affidavit from defendant's principal indicating plaintiff's noncompliance, the preliminary injunction is vacated without further Order of the Court; and it is further

ORDERED that in the event plaintiff fails to obtain an undertaking in the amount of \$150,000.00, as indicated above, then and in that event, upon receipt by the Court of an affidavit from defendant's principal indicating plaintiff's noncompliance, the preliminary injunction is vacated without further Order of the Court; and it is further

ORDERED that in the event plaintiff fails to make payments of the regular monthly base rent, as indicated above, then and in that event, upon receipt by the Court of an affidavit from defendant's principal indicating plaintiff's noncompliance, the preliminary injunction is vacated without further Order of the Court; and it is further

ORDERED that the Temporary Restraining Order granted on November 20, 2006 is hereby vacated; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with Notice of Entry upon counsel for defendant, within twenty (20) days of the date herein pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court; and it is further

ORDERED that a Preliminary Conference is scheduled for **April 10, 2007**, at 9:30 a.m., in the DCM Part located at 1 Court Street, Riverhead, New York.

Plaintiff was served by defendant with a five day notice to cure for non-payment of rent and for substantial additional rents under the provisions of a long term lease. Plaintiff disputes the fact that the additional rents defendant contends were incurred as the result of remedial and emergency repairs, are additional rental charges. In conjunction with the commencement of this action seeking a declaratory judgment and permanent injunctive relief, by Order to Show Cause (Baisley, J.), plaintiff was granted a temporary restraining order. In support of the Order to Show Cause, plaintiff submits her affidavit. Defendant opposes the motion and submits the affidavits of its principal, employees and non-party, which address the question of the remedial repairs and the facts and circumstances surrounding same. These affidavits do not rise to the level of refuting plaintiff's principal's sworn statement that plaintiff is ready, willing and able to cure, by any means short of vacating her valuable leasehold, the repairs (*see ERS Enter., LLC*, 286 AD2d 206, 729 NYS2d 23 [1st Dept 2001]).

In addition to seeking a permanent injunction, plaintiff also seeks during the pendency of this action a Yellowstone injunction (*see First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630, 290 NYS2d 721 [1968]), to enjoin defendant from terminating her lease and tolling the time period for her to cure, as well as, to enjoin defendant from serving a notice of termination and/or commencing a summary proceeding or any eviction proceeding to remove her from the premises known as 1741 Montauk Highway, Bellport, New York 11735. Plaintiff operates a gasoline service station and convenience store located on said premises and has received from defendant a five day notice to cure based upon a disagreement between the parties regarding the amount of rent owed by plaintiff. Plaintiff's motion is timely (*see TSI West 14, Inc. v Samson Assoc., LLC*, 8 AD3d 51, 778 NYS2d 29 [1st Dept 2004]; *Herzfeld & Stern v Ironwood Realty Corp.*, 102 AD2d 737, 477 NYS2d 7 [1st Dept 1984]).

"The purpose of a Yellowstone injunction is to maintain the status quo so that a commercial tenant may protect its valuable property interest in the lease while challenging the landlord's assessment of its rights" (*225 East 36th St. Garage Corp., v 221 East 36th Owners Corp.*, 211 AD2d 420, 621 NYS2d 302 [1st Dept 1995] citations omitted; *see also Top-All Varieties, Inc. v R&J Dev. Co.*, 151 AD2d 470, 542 NYS2d 259 [2d Dept 1989]). The basic premise underlying the granting of a Yellowstone injunction is that it gives a tenant, who has received a notice to cure, time to try and resolve the matter despite the fact there

may have been a substantial breach of an obligation under the lease (see *Finley v Park Ten Assocs.*, 83 AD2d 537, 441 NYS2d 475 [1st Dept 1981]).

Unlike a general preliminary injunction, a Yellowstone injunction does not require a showing that the plaintiff will likely succeed on the merits of its claim (see *Post v 120 East End Ave. Corp.*, 62 NY 2d 19, 475 NYS 821 [1984]). A party seeking to obtain a Yellowstone injunction must only demonstrate that the following conditions are present: (1) there is a commercial lease in effect; (2) a notice to cure was served upon the tenant; (3) an application to the court for injunctive relief prior to the expiration or termination of the lease exist; and (4) the party has the desire and ability to cure the alleged default by any means short of vacating the premises (see *Purdue Pharma, LP v Ardsley Partners, LP*, 5 AD3d 654, 774 NYS2d 540 [2d Dept 2004]; *King Party Contr. of Pitkin Ave. v Minco*, 286 AD2d 373, 729 NYS2d 183 [2d Dept 2001]; *Zona, Inc. v Soho Centride LLC*, 270 AD2d 12, 704 NYS2d 38 [1st Dept 2000]; *Graubard Mollen Howowitz Pomeranz & Shipiro v 600 Third Ave. Assocs.*, 93 NY2d 508, 693 NYS2d 91 [1999]; *Matter of Langfur*, 198 AD2d 355, 603 NYS2d 576 [2d Dept 1993]; *Stuart v D&D Assocs.*, 160 AD2d 547, 554 NYS2d 197 [1st Dept 1990]; *Podolsky v Hoffman*, 82 AD2d 763, 441 NYS2d 238 [1st Dept 1981]). The tenant, however, must continue to pay rent including all rent due and owing during the pendency of the action (see *Graubard Mollen Howowitz Pomeranz & Shipiro v 600 Third Ave. Assocs.* 93 NY 2d 508, *supra*; *Physician's Planning Service Corp. of Connecticut v 292 Estates, Inc.*, 88 AD2d 852, 451 NYS2d 425 [1st Dept 1992]).

When a Court in its discretion grants an application for Yellowstone injunctive relief, it may impose reasonable conditions, including the posting of an undertaking pursuant to the required provisions of CPLR 6312 by the party seeking the relief (see *3636 Greystone Owners, Inc. v Greystone Bldg.*, 4 AD3d 122, 771 NYS2d [1st Dept 2004]; *Bennigan's of New York, Inc. v Great Neck Plaza, L.P.*, 223 AD2d 615, 636 NYS2d 835 [2d Dept 1996]; *Sportsplex of Middletown, Inc. v Catskill Regional Off-Track Betting Corp.*, 221 AD2d 428, 633 NYS2d 588 [2d Dept 1995]; *1286 RR Operating v McAlpin Assocs.*, 169 AD2d 450, 564 NYS2d 153 [1st Dept 1991]).

While, as a general rule, the amount of a bond to be imposed is fixed after a hearing (see *Peron Rest. Inc. v Young & Rubicam, Inc.*, 179 AD2d 469, 578 NYS2d 194 [1st Dept 1992]; *Times Sq. Stores Corp. v Fernice Realty Co.*, 107 AD2d 677, 484 NYS2d 591 [2d Dept 1985]), the undisputed submissions of the parties regarding the contested rental amount negates the necessity of a hearing as it is rationally related to the damages the non-moving party might suffer if the court later determines the relief should have not been granted (see *Ujueta v Euro-Quest Corp.*, 29 AD3d 895, 814 NYS2d 551 [2d Dept 2006]; *Lelekakis v Kamamis*, 303 AD2d 380, 755 NYS2d 665 [2d Dept 2003]).

Therefore, in light of plaintiff's valuable leasehold interest in the premises and a sufficient demonstration of the necessary elements, the Court finds that a Yellowstone injunction is warranted to avoid termination of the lease (see *Marathon Outdoor, LLC v Patent Contr. Sys. Div. of Harsco Corp.*, 306 AD2d 254, 760 NYS2d 528 [2d Dept 2003]; *Terosal Props. v Bellino*, 257 AD2d 568, 683 NYS2d 581 [2d Dept 1999]).

In granting plaintiff's application for a Yellowstone injunction, the Court has imposed certain conditions as indicated above.

Accordingly, the motion is granted as noted herein. This constitutes the Order and decision of the Court.

DATED: 3/19/07


THOMAS F. WHELAN, J.S.C.