

**Hamiltonian Corp. v Trinity Ctr., LLC**

2007 NY Slip Op 30517(U)

March 30, 2007

Supreme Court, New York County

Docket Number: 0113395/2006

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: Hon. LOUIS B. YORK Justice PART 2

HAMILTONIAN CORPORATION,  
Plaintiff,  
-against-  
TRINITY CENTRE, LLC,  
Defendant.

Index No. 113395/06  
Motion Date 01/03/07  
Motion Seq. No. 01  
Motion Cal. No. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for Preliminary Injunction

NUMBERED  
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion: [ ] Yes [ ] No

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or a court representative must appear in person at the County Clerk's Desk (Room 31E).

Upon the foregoing papers, it is

**ORDERED** that this motion for a Yellowstone Injunction and a Declaration that the plaintiff is not in default of the lease is denied and the cross-motion to dismiss this action is granted.

The Yellowstone relief seeks to enjoin the defendant from enforcing the conditional limitation in the lease that a transfer of more than 50% of the interest in the lease requires ~~that~~<sup>the</sup> consent of the defendant-landlord which was neither requested nor given and, also, to challenge the allegation that plaintiff is in default of the payment of additional rent. Defendant has served a Notice of Default based on the

grounds that plaintiff has challenged. Plaintiff is moving to toll the Notice until these issues are decided.

While movant vigorously challenges the claim that it owes additional rent and that more than 50% of the assets were transferred, it does not challenge that the transfer of more than 50% is a conditional limitation and only in reply papers does it allege in conclusory fashion that if it is found that it owes the rent, it will pay the additional amount.

The landlord contends that the plaintiff's defaults are incurable and the part of the motion seeking a declaration as to the matters in dispute is premature as no answer has as yet been lodged against the complaint.

The function of a Yellowstone Injunction is to stop the running of a Notice to Cure so that if the plaintiff is held to have violated the disputed lease term, the Court can keep the Notice to Cure tolled while an adequate time is given to the defendant to rectify the problem. But here, we have a conditional limitation which cannot be cured if, in fact, more of 50% of the interest in the lease has been conveyed. Consequently, the Yellowstone Injunction cannot help and plaintiff's only recourse is to defend in any holdover proceeding that is brought on these grounds. If the plaintiff does owe any arrears, the defendant will bring a non-payment of rent

summary proceeding as it has done in the past, and plaintiff will have an opportunity to satisfy a judgment obtained on non-payment grounds as it has done in the past.

The defendant also claims that there is a persistent pattern by the plaintiff of not paying the rent over successive months, and only at the last minute after a proceeding is brought or a judgment of possession has been rendered, does the plaintiff pay up, leaving the defendant without adequate income for months on end. If this is true, the defendant has the option to initiate a holdover proceeding based on a persistent pattern of non-payment of rent.

Even if the Court were to award the plaintiff some relief, it cannot award it a Declaratory Judgment because issue has not yet been drawn.

Since a declaratory judgment cannot assist the plaintiff in avoiding the transfer of more than <sup>the</sup> 50% conditional limitation and plaintiff is adequately protected in a non-payment proceeding by timely satisfying a judgment in defendant's favor, there is no adequate basis for bringing this action.

Accordingly, it is

**ORDERED** and **ADJUDGED** that this motion for a Yellowstone Injunction is denied as is the portion of the motion seeking a declaratory judgment. That latter request is premature; and it is

ORDERED and ADJUDGED that although requested, neither party is awarded attorney fees. Attorney's fees are awarded to the prevailing party when the lease states that the tenant is responsible for attorney's fees if the plaintiff brings an action to enforce a term of the lease as the plaintiff has done. Such a one-sided agreement is contrary to public policy.

Dated: 3/30/07

Enter:

**UNFILED JUDGMENT**

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Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE