

Magazines & More, Inc. v Delmar Realty. Co., Inc.

2007 NY Slip Op 30631(U)

January 30, 2007

Supreme Court, New York County

Docket Number: 0115663/2006

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

Magazines + More Inc.

INDEX NO. 115663/06

MOTION DATE _____

- v -

Delmar Rlty Co

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this motion to/for preliminary injunction

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

PAPERS NUMBERED

1, 2

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for a preliminary injunction is granted ~~upon motion~~ in accordance with the attached memorandum decision.

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HON. DORIS LING-COHAN

Dated: _____

1/30/07



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

MAGAZINES & MORE, INC. d/b/a
MAGAZINE PLUS,

Index: 115663/06

Plaintiff,

Motion Seq. 001

-against-

DECISION/

DELMAR RLTY. CO., INC. and
233 BLEECKER ST., LLC.,

ORDER

Defendant.

Plaintiff's motion for an order granting it a preliminary injunction is granted without opposition submitted by defendants.

Plaintiff, a commercial tenant of defendants landlord, 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 staying and tolling the expiration of the cure period set forth in the Notice to Cure dated September 18, 2006 and enjoining and restraining defendants from taking any action to terminate plaintiff's lease and/or to commence summary proceedings to evict plaintiff, or interfere with plaintiff's possession of the subject premises.

Defendant has failed to submit opposition to the within order to show cause, despite being granted, upon consent of plaintiff, two adjournments from the original return date of this motion.

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

¹ The Court notes that this matter had an initial return date of October 31, 2006, which was adjourned, upon consent of the parties, to November 29, 2006. The parties entered into a stipulation on November 29, 2006 further adjourning this matter to January 3, 2007, for the submission of opposition and reply papers; the Court, however, is not in receipt of any additional papers on this matter, other than the original order to show cause and supporting documents.

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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, plaintiff has 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 plaintiff received from defendants a Notice of to Cure dated September 18, 2006, in which plaintiff was to cure the alleged lease violations by October 20, 2006; (3) timely requested injunctive relief prior to the October 20, 2006 effective termination date; and (4) is prepared and maintains the ability to cure the default alleged in the September 18, 2006 Notice to Cure by a means other than vacating the subject premises. *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 583 (1st Dept 1981).

The Court notes that “the law does not favor [the] forfeiture of...leasehold[s] (*Herzfeld & Stern v. Ironwood Rlty. Corp.*, [102 AD2d 737, 738]”. *225 E. 36th St. Garage Corp. v. 221 E. 36th Owners Corp.*, 211 AD2d at 422; *Zaid Theatre Corp. v. Sona Rlty Co.*, 18 AD3d 352(1st Dept

2005). Thus, this order is rendered to maintain the status quo during the course of this litigation.

Based upon the above, it is

ORDERED that plaintiff's motion for a preliminary injunction is granted, to the extent that the termination date set forth in the subject Notice to Cure dated September 18, 2006 is tolled and defendants, any of its partners, members and agents, are restrained from taking any further steps to terminate plaintiff's lease on the basis of any of the alleged defaults asserted in such Notice to Cure, pending the determination of this action, *on condition that* plaintiff timely pays the monthly rent in accordance with the terms of the parties' 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 Friday, March 9, 2007, 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 defendants 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: January 30, 2007


Doris Ling-Cohan, JSC

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