475 Bldg. Co. LLC v 475 Park Ave. S. LLC
2007 NY Slip Op 30666(U)
April 2, 2007
Supreme Court, New York County
Docket Number: 0108685/2006
Judge: Sherry Klein Heitler
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SCANNED ON 4/4/2007

[* 1]

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

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

475 BUILDING COMPANY LLC,

Plaintiff,

- v -

475 PARK AVENUE SOUTH LLC,

Defendant.

INDEX NO. 108685/06

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

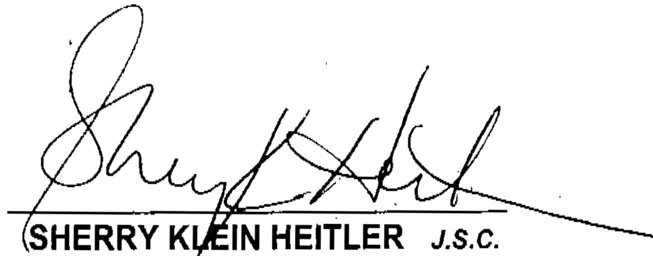
Upon the foregoing papers, it is hereby

ORDERED that this motion is decided in accordance with Memorandum / Decision dated APRIL 2, 2007.

FILED
APR 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4-2-07



SHERRY KLEIN HEITLER 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 PART 30

---X

475 BUILDING COMPANY LLC,

Plaintiff,

Index No. 108685/06
113303/06

- against -

475 PARK AVENUE SOUTH LLC,

Defendant.

---X

FILED
APR 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

SHERRY KLEIN HEITLER, J.

Plaintiff, 475 Building Company LLC, the commercial tenant under a triple ground lease for the building referred to as 475 Park Avenue South,[1] moves by orders to show cause dated June 22, 2006 (Index No. 108685/06), and September 18, 2006 (Index No. 11303/06), for *Yellowstone* injunctions, pending determination of the tenant's action for declaratory and injunctive relief.

Plaintiff-tenant alleges that in 1970, in accordance with the 1967 triple ground lease, the tenant's predecessors in interest completed construction of the building, a 34 story structure with approximately 400,000 square feet of commercial space, 14,000 square feet of retail space, and a below ground parking garage of about 30,000 square feet, all of which is subleased by the tenant in accordance with the ground lease. The tenant asserts that it has never been delinquent in payment of the fixed monthly net rent or additional rent, and that its current lease term does not expire until April 30, 2072.

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[1] The premises that are the subject of this action are variously identified by the parties as 471-477 Fourth Avenue (n/k/a "Park Avenue South") and 100-110 East 32nd Street, 465-477 Park Avenue South, and 475 Park Avenue South (*see e.g.* 6/21/06 Cohen Aff., exh 2; 7/18/06 Citrone Aff.; 6/21/06 Edward Ballus Aff.; 6/21/06 Nicholas Stanton Aff.; 6/21/06 Howard Zimmerman Aff.; 7/12/06 Stephan L. Dejean Aff.).

The June 22, 2006 order to show cause is addressed to a 20-day notice to cure dated March 26, 2006, which asserts that the tenant failed to cure 57 Department of Buildings (DOB) violations, six New York City Fire Department violations, and one New York City Highway Department violation. The March 26, 2006 notice to cure directs the tenant to cure all of the violations by June 30, 2006, and states that failure to cure by the stated date would result in the landlord taking action to terminate the lease. The June 22, 2006 order grants a temporary restraining order, pending a hearing on the tenant's application for a *Yellowstone* injunction, enjoining the landlord from taking any steps to terminate the lease based upon the March 26, 2006 notice to cure, and tolling the tenant's time to cure.

In support of the application for *Yellowstone* relief from the March 26, 2006 notice, Madeline Citrone, Vice President for Cohen Brothers Realty Corp., the managing agent for the building, submitted an affidavit dated July 18, 2006, with exhibits demonstrating that 42 of the 57 DOB violations cited in the March 26, 2006 notice are related to the elevators in the building. Out of those 42 violations, 36 were dismissed, the nature of one could not be identified, and the tenant represents that an application for a certificate of correction would be submitted to remove the remaining violations upon completion of the work required to correct the conditions cited, the scope of which was approved by the tenant on June 15, 2006. The Citrone affidavit states that six of the DOB violations relate to a sidewalk shed erected in relation to the facade renovations that were underway, in part, to correct another seven of the DOB violations cited on the notice. With respect to the sidewalk shed violations, four out of the six were dismissed, and a Certificate of Correction was pending for the remaining two. The single "Public Assembly" violation was dismissed by the date of the Citrone

affidavit. The tenant asserted that it could not determine the nature of the single transportation violation cited until it received a response to its request for a copy of the violation.

There were 10 Fire Department violations listed on the March 26, 2006 notice. Although one was dismissed in November 2005, it was not removed from the record. The Citrone Affidavit states, that five of the Fire Department violations were cured but remained on record, so the tenant requested a hearing or inspection to have the matters removed. The tenant represents that it could not determine the nature of four of the Fire Department violations until it received a response to its request for copies.

The remaining seven violations cited on the March 26, 2006 notice to cure are related to the building facade. With respect to these violations, the tenant submitted a number of different affidavits from engineers, architects and contractors to demonstrate that it was in the process of not only repairing but replacing all of the brick on the building facade with steel and glass. One of the violations requires the tenant to install a sidewalk shed. According to Citrone, that was done. The majority of the facade related violations were for "failure to submit 5th round technical report[s]." According to the affidavit of Charles Cohen, President of the tenant's managing member, the tenant's first attempt to file the required report was rejected by the DOB, and in the process of determining what needed to meet Building Code requirements, the tenant determined that all of the brick face on the building had to be removed, the layer under the brick face had to be waterproofed, and then the building had to be resurfaced. The tenant submits affidavits from various contractors and architects regarding the nature and extent of the work to be done, and the progress that was being made on the project. The tenant estimates that the cost of the renovation work would be around $15 million, and asserts that the landlord is interfering with the work by failing to execute an estoppel

certificate, which the tenant asserts must be obtained in order to finance the project. The Third cause of action alleged in the tenant's complaint seeks an injunction compelling the landlord to issue the estoppel certificate pursuant to Article XV of the lease.[2]

The tenant asserts that pursuant to Article XXI, Section (2)(b) of the ground lease, it has a right to additional time to cure, and that so long as it is making diligent efforts to remedy the defects and cure the violations, the landlord has no right to terminate the lease. Article XXI Section (2)(b) states, in pertinent part:

> (b) (i) if Tenant shall be in default in the performance of any of the other terms, covenants and conditions of this lease and such default shall not have been cured within 20 days after notice by Landlord to Tenant specifying such default and requiring it to be remedied; or (ii) where such default reasonablely cannot be remedied within such period of 20 days, if Tenant shall not have commenced the remedying thereof within such period of time and shall not be proceeding with due diligence to remedy it;

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[2] Article XV, Section 2 of the ground lease provides, in part:

> Within 15 days after request by Tenant, Landlord, from time to time and without charge, shall deliver to Tenant or to a person, firm or corporation specified by Tenant, a duly executed and acknowledged instrument, certifying:
>
> (a) that this lease is unmodified and in full force and effect, or if there has been any modification, that the same is in full force and effect, as modified...
>
> (b) Whether the Landlord knows of any default by Tenant in the performance by Tenant of the terms, covenants and conditions of this lease, and specifying the nature of such default, if any;
>
> (c) the dates to which the fixed net rent and additional rent have been paid.
>
> * * * *

> then the Landlord, at its election may terminate this lease on at least 10 days notice to Tenant and this lease shall come to an end upon dates specified in such notice as though such date marked the natural expiration of the term of this lease....

While the motion was *sub judice*, the landlord filed a second 20-day notice to cure dated August 23, 2006. It listed four new Fire Department violations, two additional DOB violations, and directed the tenant to cure by September 20, 2006. In response, plaintiff-tenant brought another order to show cause for *Yellowstone* relief, signed September 18, 2006, with a temporary restraining order addressed to the August 23, 2006 notice (Index No. 113303/06). In support of this second motion, the tenant introduced evidence to demonstrate that three out of the six violations set forth on the notice were incorrectly indexed and referred to the Ritz Carlton Hotel, located 25 blocks north of the demised premises at 465 Park Avenue, not Park Avenue South. Out of the three remaining violations cited, one is an elevator violation, and plaintiff submitted evidence to demonstrate that the repair work on the elevator was completed before the second notice was served. The second remaining violation is a facade violation, as to which plaintiff submitted additional evidence regarding the progress on the facade restoration, and why it could not progress any faster. The third violation is a Fire Department violation, the nature of which the tenant could not determine without additional information from the Fire Department, which it requested.

The purpose of a *Yellowstone* injunction is to toll the cure period set forth in the landlord's notice to cure, and allow the tenant to litigate its dispute with the landlord without forfeiting a valuable leasehold interest, as occurred in *First Natl. Stores, Inc. v Yellowstone Shopping Ctr.* (21 NY2d 630, 638 [1968]; *see Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Avenue Assoc.*, 93 NY2d 508, 514 [1999]). The party requesting a *Yellowstone* injunction must demonstrate that: 1) it holds a commercial lease; 2) it has received notice of default from the landlord; 3) the

application was made prior to the termination of the lease; and 4) it has the desire and ability to cure the alleged default by any means short of vacating the premises (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Avenue Assoc.*, 93 NY2d at 514; *Purdue Pharma, LP v Ardsley Partners LP*, 5 AD3d 654 [2d Dept 2004]; *ERS Enterprises, Inc. v Empire Holdings, LLC*, 286 AD2d 206, 207[1st Dept 2001]). In this case, the tenant has demonstrated its right to *Yellowstone* relief, and contrary to the landlord's contention, the question of whether the landlord is entitled to commence termination proceedings for the reasons stated in the notices, and whether the tenant is entitled to an estoppel certificate or a declaration of non-default under Article XV of the ground lease, are justiciable controversies that have not been rendered academic by virtue of the tenant's admittedly diligent efforts to cure (*see Purdue Pharma v Ardsley Partners*, 5 AD3d at 656).

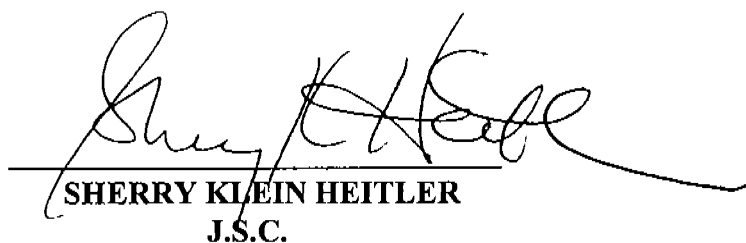
The landlord appears to have abandoned its argument, asserting a defect in personal service of the initial order to show cause under CPLR 311-a. The tenant, in any event, has demonstrated that alternate service was made upon the Secretary of State (*see* Limited Liability Company Law § 303 [a]; *Majestic Clothing Inc. v East Coast Storage, LLC*, 18 AD3d 516, 517 [2d Dept 2005]; *Crespo v A.D.A. Management*, 292 AD2d 5, 9-10 [1st Dept 2002]). The landlord asserts no rental arrears or other reason why plaintiff should be required to post an undertaking (*see WPA/Partners LLC v Port Imperial Ferry Corp.*, 307 AD2d 234, 236 [1st Dept 2003]; *Kuo Po Trading Co., Inc. v Tsung Tsin Assoc., Inc.*, 273 AD2d 111, 112 [1st Dept 2000]).

Accordingly, for the reasons set forth above, it is hereby:

ORDERED that plaintiff's motions for a Yellowstone injunctions, under Index Number 108685/06 and Index Number 11303/06, are granted, and the periods to cure established under the March 26, 2006, and the August 23, 2006 notices to cure, are tolled, pending a determination of the tenant's complaint.

This shall constitute the decision and order of the court.

DATED: APRIL 2, 2007



SHERRY KLEIN HEITLER
J.S.C.

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