[* 1]
SCANNED ON 4/17/2007

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

PRESENT: LOUIS B. YORK J.S.C. PART 2
Justice

Rugs On Stone, Inc.,

-v-

MBA, LLC

INDEX NO. 118894/06

MOTION DATE

MOTION SEQ. NO. 01

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

FILED

APR 17 2007

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 4/12/07

LOUIS B. YORK J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2

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RUGS ON STONE, INC.,

Plaintiff,

INDEX NO.
118894/06

-against-

MBA, LLC,

Defendant.

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LOUIS B. YORK, J.:

Plaintiff, by order to show cause, moves pursuant to CPLR 6301 for a Yellowstone injunction enjoining defendant from terminating or cancelling plaintiff's sublease of a building at 211 E 59th Street in Manhattan (the "building") and from commencing any proceedings to recover possession of the premises.

Plaintiff rug merchant became the lessee of the mixed use four-story building pursuant to a sublease commencing September 19, 1996 and expiring December 31, 2006 (exhibit B to moving papers), from Winchester Properties, Inc. ("Winchester"), which then held the prime lease on the building. In January 2001, after unsuccessfully negotiating with plaintiff to acquire its sublease, defendant acquired the prime lease to the building from Winchester. By letter dated November 29, 2005 (exhibit D to moving papers), plaintiff advised defendant that it was exercising its option to extend the term of the sublease for five years (Jan 1, 2007 to Dec 31, 2011).

On November 15, 2006, plaintiff received a notice to cure from defendant (exhibit A to moving papers) notifying plaintiff that it was in breach of its obligation under the sublease to

keep the building in good repair, and in breach of the prime lease by letting its liability insurance expire on November 12, 2006, and that its tenancy of the building would be terminated on December 26, 2006, unless those defaults were cured before then.

On December 21, 2006, prior to the expiration of its sublease and of the cure period specified in the notice to cure, plaintiff commenced the instant action seeking a declaration that it was not in breach of its contractual obligations with respect to the building. On December 22, 2006, the order to show cause seeking the Yellowstone injunction at bar was served on defendant.

Plaintiff's president, Richard Afkari ("Afkari"), contends that the defective conditions specified in the notice to cure "are untrue, exaggerated and without substantial basis in fact" (Afkari supporting affidavit, ¶ 18; see also ¶ 20). Afkari further avers that since the inception of its tenancy plaintiff has "invested more than $125,000.00 in renovating and repairing" the building (id., ¶ 10), including reconstruction of the front of the building (id., ¶ 14) and extensive structural repairs to the third and fourth floors in 2000 (id., ¶ 17). In support of its contention that it is not in breach of the sublease or the prime lease, plaintiff has submitted proof that it obtained liability insurance effective November 18, 2006 through November 18, 2007 (exhibit "F"[1] to moving papers), and an engineer's report purportedly showing that there are no major problems with the building (exhibit "E"[1] to moving papers).

Defendant counters with the affidavit of one of its members, Benjamin Aryeh ("Aryeh"), who inspected the building on November 14, 2006 (the day before defendant served the notice to cure), and who, without stating his qualifications or fitness to opine, renders his opinion that based on his observations the building was in serious structural disrepair (Aryeh

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[1] Exhibit F to the moving papers follows exhibit D, and exhibit E follows exhibit F.

opposing affidavit, ¶¶ 11-19, 24, 29, 32), and with its own engineer's report (exhibit A to Aryeh opposing affidavit) purportedly showing that there were serious conditions in the building in need of repair (Aryeh opposing affidavit, ¶¶ 34-60).

Unlike injunctions pursuant to CPLR Article 63, a Yellowstone injunction, designed simply to maintain the *status quo*, does not require a showing of likelihood of success on the merits (Lexington Avenue & 42nd Street Corporation v. 380 Lexchamp Operating, Inc., 205 AD2d 421, 423 [1st Dept 1994]), "since plaintiff risks forfeiture of its leasehold 'and the law does not favor such forfeiture" (TSI West 14, Inc. v. Samson Associates, LLC, 8 AD3d 51, 53 [1st Dept 2004], citations omitted). "The mere threat of termination and forfeiture of the lease [is] sufficient to justify maintenance of the **status quo** by [a Yellowstone] injunction" (Garland v. Titan West Associates, 147 AD2d 304, 307-308 [1st Dept 1989]).

To meet "the test for granting Yellowstone relief ... [the tenant must demonstrate that]: (1) it holds a commercial lease; (2) it has received from the landlord a notice of default; (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" (ERS Enterprises, Inc. v. Empire Holdings, LLC, 286 AD2d 206, 206-207 [1st Dept 2001], citing First National Stores, Inc. v. Yellowstone Shopping Center, Inc., 21 NY2d 630 [1968], rearg den 22 NY2d 827 [1968]; see also 225 East 36th Street Garage Corp. v. 221 East 36th Owners Corp., 211 AD2d 420, 421 [1st Dept 1995]).

The second and third element of this test are undisputedly met by plaintiff. With respect to the first element, defendant argues that plaintiff does not currently have a commercial lease because the sublease expired on December 31, 2006, and the five-year renewal option

exercised by plaintiff a year earlier was invalid since even then plaintiff was in default of the sublease because the building was in disrepair. Although it is arguable that the final determination in this action could mirror defendant's argument, it is too remote at this juncture to preclude the injunctive relief sought by plaintiff. Defendant's claim that plaintiff was in breach of the lease in December 2005 is based on mere extrapolation, since no notice to cure was sent prior to November 15, 2006. The argument that the option was not validly exercised because plaintiff did not name an appraiser in its letter, raised for the first time in this litigation rather than contemporaneously, is unavailing.

With respect to the fourth element, the court finds that defendant's is misguided in its argument that plaintiff lacks the desire and ability to cure its defaults because it refuses to admit them. "A leaseholder seeking a Yellowstone injunction ... must demonstrate, *inter alia*, that it has the desire and ability to cure the alleged default by any means short of vacating the premises" (Metropolis Westchester Lanes, Inc. v. Colonial Park Homes, Inc., 187 AD2d 492, 492-493 [2d Dept 1992], citations omitted). However, The fact that a Yellowstone injunction may not be granted if plaintiff is not willing to cure its default does not mean that plaintiff cannot challenge the existence of such default. Plaintiff, through the affidavits of its president, has expressed the requisite willingness and ability to cure any default judicially determined to exist (see Afkari reply affidavit, ¶ 3; Afkari supporting affidavit, ¶ 26).

"Plaintiff has represented neither that it is unable to cure the alleged default nor, by its challenge to defendant's claim, that it is unwilling to cure.... [Rather,] plaintiff has stated its willingness to cure, should the court find that necessary.... Plaintiff has satisfied its burden of establishing that it has both the desire and the ability to cure the alleged default by means short of

vacating the premises by indicating in its motion papers that it is willing to repair any defective condition found by the court and by providing proof of the substantial efforts it has already made.... This showing is not negated by plaintiff's challenge to the necessity of making further repairs" (TSI West 14, Inc. v. Samson Associates, LLC, supra, 8 AD3d at 52-53, citing ERS Enterprises, Inc. v. Empire Holdings, LLC, 286 AD2d 206, 207 [1st Dept 2001] and Terosal Properties v. Bellino, 257 AD2d 568, 569; Brownskin Shoe Corp. v. Ladies Mile, Inc., 15 AD3d 220, 221 [1st Dept 2005]).

Accordingly, plaintiff's motion pursuant to CPLR 6301 for a Yellowstone injunction is granted to the extent that defendant shall be enjoined, during the pendency of this action, from terminating or cancelling plaintiff's sublease of the building and from commencing any proceedings to recover possession of the premises. The expiration of defendant's time to cure its defaults (if any) shall be tolled until 30 days after service of the court's final adjudication in this action with notice of entry.

Use and occupancy shall continue at the rate specified in the TRO without prejudice, and the interrupted appraisal process may continue without prejudice.

Plaintiff shall post an undertaking in the amount of $25,000 to secure damages and costs which defendant may sustain as a result of the injunctive relief granted herein if it is determined upon final resolution of this action that plaintiff was not entitled to such relief.

This decision constitutes the order of the court.

DATED: April 12, 2007

J.S.C.