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

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

STARWICH, INC.,

Plaintiff,

- v -

RBNB WALL STREET OWNER, LLC.,

Defendant.

Index No.: 104381/07

Motion Date: 4/17/07

Motion Seq. No.: 01

Motion Cal. No.: _____

The following papers, numbered 1 to 2 were read on this motion for a Yellowstone injunction.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

On this motion, plaintiff moves for a Yellowstone injunction (see First National Stores, Inc. v Yellowstone Shopping Center, Inc., 21 NY2d 630 [1968]) to stay the cure period of a notice to cure (captioned "Notice of Default") delivered on March 5, 2007, by plaintiff's landlord, the named defendant, pending resolution of this action for a declaratory judgment to determine the rights and obligations of the parties under plaintiff's lease and a permanent injunction preventing the defendant from terminating such lease.

A party seeking a Yellowstone injunction must demonstrate that: "(1) it holds a commercial lease; (2) it received from the

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check If appropriate: ☐ DO NOT POST ☐ REFERENCE

landlord either a notice of default, a notice of cure, or a threat of termination of the lease; (3) it requested 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 short of vacating the premises." Zona, Inc., v Soho Centrale, LLC, 270 AD2d 12, 13 (1st Dept 2000) (citations omitted).

The only dispute is whether plaintiff has met its burden with respect to plaintiff's preparation and maintenance of the ability to cure.

This action concerns a ten year commercial store lease entered into between the parties on March 16, 2005. The use of the premises under the lease is as an "upscale quick service café offering made to order gourmet salads and sandwiches." Paragraph 3(f) of the lease provides "Tenant shall install and maintain in good working order (i) ventilating equipment, necessary in the sole judgment of Landlord to remove unreasonable odors and fumes in the Premises as required and approved by fire rating organization (in connection with the foregoing, Landlord's judgment shall be reasonable so long as Tenant does not cook in the Premises)".

Rules and Regulations number 8 of the lease provides, in pertinent part, "Tenant shall not cause or permit any odors of

cooking or other processes, or any unusual or other objectionable odors, to permeate in or emanate from the Premises."

The Notice of Default states that pursuant to those provisions,

> "Tenant is required to install and maintain in good working order ventilating equipment to remove unreasonable odors and fumes in the Premises and is prohibited from causing or permitting any odors of cooking or other processes to permeate in or emanate from the Premises. Cooking odors and fumes, which are unreasonable, have been and continue to emanate from the Premises, and Tenant has not installed or maintained the necessary ventilating equipment. Tenant has failed to comply with its obligations under the Lease to install and maintain such equipment and prevent the emanation of odors and fumes."

Defendant argues that plaintiff's application for a Yellowstone injunction should be denied because plaintiff has not shown that it is willing to cure the condition cited in the Notice of Default. Specifically, defendant argues that the proposal plaintiff submitted is not viable. Defendant's principal submits an affidavit of an engineer, which states that the range hood specified by plaintiff is for residential not commercial use and will not ameliorate the condition emanating from the store. Though plaintiff has not proposed an exterior ventilation solution, defendant's expert also opines that the applicable building codes will not allow exterior ventilation, in any event.

The First Department has held that "[t]he proper inquiry is whether a basis exists for believing that the tenant desires to

cure and has the ability to do so through any means short of vacating the premises." Herzfeld & Stern v Ironwood Realty Corp., 102 AD2d 737, 738 (1st Dept 1984). In reversing a trial court's denial of a Yellowstone injunction, the First Department rejected the very argument proffered by the defendant in support of its position in this action, stating that

> "The cases advanced by defendant in support of its contention that plaintiff has not shown a willingness to cure the alleged default involve situations in which the tenant either affirmatively indicated its refusal to cure...or blatantly demonstrated that it had no intention to cure an obvious breach. Here, the plaintiff has clearly stated its willingness to restore the premises to their prior condition, should the court find that necessary (citations omitted).

TSI West 14, Inc., v Samson Associates, LLC, 8 AD3d 51 (1st Dept 2004).

Therefore, plaintiff has met its burden of demonstrating entitlement to a Yellowstone injunction pursuant to defendant's Notice of Default dated March 1, 2007 and the court shall grant the motion.

As a condition of the injunction the court shall require plaintiff to pay ongoing use and occupancy for the premises for the duration of the injunction at the same rate as the current rent under the lease. See 401 Hotel, L.P. v MTI/The Image Group, Inc., 271 AD2d 228, 230 (1st Dept 2000). As defendant has not requested nor proffered any evidence that it will suffer additional damages from the granting of the injunction, the use and occupancy shall constitute the required undertaking pursuant

to CPLR 6312 (b). CPLR 6312 (b) (2); see 61 West 62nd Owners Corp. v Harkness Apartment Owners Corp., 173 AD2d 372, 373 (1st Dept 1991) ("The amount of the undertaking . . . [should be] rationally related to the quantum of damages which plaintiff would sustain in the event that defendant is later determined not to have been entitled to the injunction.").

Accordingly, it is

ORDERED that the plaintiff's motion for a Yellowstone injunction is GRANTED and the cure period is hereby tolled pending a determination of whether the plaintiff is in default under the Lease pursuant to defendant's Notice of Default dated March 1, 2007; and it is further

ORDERED that defendant is hereby preliminarily enjoined from terminating plaintiff's lease pending the outcome of this action and a declaration determining the rights, remedies and liabilities of the parties; and it is further

ORDERED that the Yellowstone injunction granted above is hereby conditioned on plaintiff's payment of use and occupancy for the premises in an amount equal to the rent due under the Lease.

This is the decision and order of the court.

Dated: April 25, 2007

ENTER:

J.S.C.
DEBRA A. JAMES
J.S.C.