

**Euro Optica Eyewear, Inc. v Yellowstone Commons,  
LLC**

2007 NY Slip Op 32115(U)

July 2, 2007

Supreme Court, Queens County

Docket Number: 0029073/2006

Judge: Allan B. Weiss

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## MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART 2

	x	
EURO OPTICA EYEWEAR, INC.		INDEX NO. 29073/06
Plaintiff,		MOTION SEQ. NOS. 1 & 2
-against-		BY: WEISS, J.
YELLOWSTONE COMMONS, LLC,		DATED: 7/2/07
Defendant.		
	x	

In this declaratory judgment action, plaintiff seeks to enjoin defendant from commencing summary proceedings or terminating its lease for premises located at 64-20 108<sup>th</sup> Street, Forest Hills, New York on the basis of a notice to cure dated November 22, 2006. By separate notice of motion defendant seeks to modify the temporary restraining order set forth in plaintiff's December 28, 2006 order to show cause, lift the stay as to a notice to cure dated March 6, 2007, or, in the alternative, direct the payment of use and occupancy and arrears during the pendency of this matter.

Yellowstone injunctions are routinely granted to avoid forfeiture of a commercial tenant's interest prior to a determination of the merits. (Post v 120 East End Ave. Corp., 62 NY2d 19 [1984]; First Natl. Stores v Yellowstone Shopping Ctr., 21 NY2d 630 [1968].) A tenant must demonstrate the existence of a commercial lease, receipt of a notice of default, a timely application for a temporary restraining order and the desire and

ability to cure the alleged default. (Purdue Pharma, LP v Ardsley Partners, LP., 5 AD3d 654 [2004].) The standard to be applied for a Yellowstone injunction is far less than that normally required for preliminary injunctive relief. (Post v 120 East End Ave. Corp., supra.)

This action arises out of a notice to cure dated November 22, 2006 delivered in an envelope postmarked December 4, 2006, the last date in which to cure defaults. The notice to cure, references paragraph 17 of the lease which provides for a five-day period to remedy a default. While the failure to seek a stay prior to the expiration period in which to cure will divest the court of the authority to grant equitable relief (see, King Party Ctr. of Pitkin Ave. v Minco Realty L.L.C., 286 AD2d 373 [2001]; Kingsway Caterers v Kingsway Jewish Center, 258 AD2d 442 [1999]; Long Is. Gynecological Servs., P.C. v 1103 Stewart Ave. Assocs. Ltd. Partnership, 224 AD2d 591 [1996]), here, it is undisputed that plaintiff was not given the requisite time to cure. Therefore, the November 22, 2006 notice cannot be considered a legitimate predicate for the issuance of a notice of termination. (Cf., Goldstein v Kohl's, 16 AD3d 622 [2005].) In light of the foregoing, and in order to preserve plaintiff's valuable leasehold interest, a preliminary injunction is warranted to avoid termination. (See, TSI West 14, Inc. v Samson Assocs., LLC,

8 AD3d 51 [2004]; Marathon Outdoor, LLC v Patent Constr. Sys. Div. of Harsco Corp., 306 AD2d 254 [2003.]

It is noted that defendant concedes that the defaults set forth in the November 22, 2006 notice have now been cured. The parties, if they be so advised may, therefore, move for summary relief or enter into a stipulation of discontinuance.

In the interim, plaintiff's application is granted to the extent of enjoining the defendant from taking any action to terminate the subject lease, commencing summary proceedings or otherwise interfering with its occupancy on the basis of defaults set forth in a notice to cure dated November 22, 2006, during the pendency of this action. The foregoing is conditioned upon plaintiff 1) becoming current in all arrears in an amount to be fixed in the order, within 30 days after service of a copy of the order to be entered hereon, 2) paying all rents and obligations as they become due and 3) filing an undertaking in accordance with CPLR 6312, which amount is to be fixed in the order to be entered hereon. Upon settlement of the order, the parties may submit proof as to the arrears and recommendations as to the amount of the undertaking.

Defendant's motion is granted only to the extent that the preliminary injunction presently issued is limited to the defaults set forth in the November 22, 2006 notice to cure. The March 6, 2007 notice is not reinstated by this determination. Any existing

defaults may be the subject of a new, properly served notice to cure which would necessitate the commencement by plaintiff of a new action, if an application for injunctive relief is sought.

Settle one order.

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J.S.C.