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

PRESENT: EDMEAD Justice

PART 35

1633 Bwy MARS RESTAURANT

- v -

PARAMUNT GROUP INC

INDEX NO. 102995/07

MOTION DATE 3/28/07

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	

FILED
JUL 20 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the order to show cause for a *Yellowstone* preliminary injunction tolling Mars 2112's time to cure pursuant to the notice of default is granted, on the grounds that the notice to cure at issue is facially insufficient and defective; and it is further

ORDERED that defendant's cross-motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that Mars 2112 serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

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

Dated: 7/18/07

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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1633 BROADWAY MARS RESTAURANT CORP.,

Index No. 102995-2007

Plaintiff,

-against-

DECISION/ORDER

PARAMOUNT GROUP, INC. as agent for GREF I 1633 TOWER L.P.,

Defendant.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Factual Background

1633 Broadway, Times Square, New York, is the home of Viacom, which owns, *inter alia*, MTV, MTV2, BET, VH1 and ATOM Entertainment, an on-line game company. It is also the location of plaintiff's restaurant and bar "Mars 2112," frequented by the "Beautiful People."[1]

Mars 2112 operates the restaurant and bar on the C and 1C subterranean levels (the "Premises") of 1633 Broadway (the "Building") pursuant to a 20-year commercial lease, dated June 30, 1998 (the "Lease") with defendant, Paramount Group, Inc. as agent for PGREF I 1633 Tower, L.P. ("defendant").[2] In addition to serving lunch and dinner seven days a week, Mars 2112 hosts corporate and celebrity events, parties, and video shoots. Mars 2112 also hosts

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[1] According to plaintiff 1633 Broadway Mars Restaurant Corp., a number of prominent government officials and sports and movie celebrities have visited the restaurant: former President William Jefferson Clinton, former Governor George Pataki, Venus and Serena Williams, Jorge Posada, Andre Agassi, Demi Moore, Goldie Hawn, Glen Close, John Travolta, Liam Nelson, Brad Pitt, Tom Cruise, and Harry Connick Jr.

[2] PGREF I 1633 Tower, L.P. is the successor-in-interest to MRI Broadway Rental, Inc. as owner of the Building. Although it appears from the submissions that PGREF I 1633 Tower, L.P. is the proper name of the defendant, the defendant is sued herein as *GREF* I 1633 Tower, L.P.

children's parties, bar mitzvahs and bat mitzvahs, product launches, summer field trips, girl/boy scouts, graduation parties and birthday parties. Mars 2112 also conducts etiquette classes for underprivileged elementary children. According to Mars 2112, it caters to various events on weekends, and has provided advance written notice to the defendant of such weekend events, without objection. Mars 2112 contends that its restaurant and bar business is entirely consistent with the entertainment theme of the Building, which is tenanted by numerous entertainment-oriented businesses as noted above.

Yet, defendant served a three-day Notice to Cure, dated March 1, 2007 ("Notice to Cure") which states the following:

> We hereby notify you that you are in default under the Lease for violating, among other provisions, Sections 3.01, 3.02, 3.03, 5.01(m), 9.01, 32.02 and 32.04 thereof. Your defaults include, without limitation, using the Premises for functions that impair the character and reputation of the Building. . . .

Order to Show Cause

Mars 2112 now moves by order to show cause, seeking a *Yellowstone* injunction tolling its time to cure the alleged defaults claimed in the Notice to Cure. Mars 2112 argues that the Notice to Cure is unclear and not unequivocal on its face, and thus, is facially defective as it fails to set forth with any specificity the defaults claimed. Mars 2112 also argues that in the event the Court determines that Mars 2112 is in default, Mars 2112 has the desire and ability to cure any such default. The corresponding Complaint demands a judgment declaring that the Notice to Cure is facially defective and of no force and effect, as well as a declaration that Mars 2112 is not in default of the Lease.

Cross-Motion

In response, defendant cross-moves pursuant to CPLR 3212 to dismiss the complaint. Defendant argues that dismissal of the complaint is warranted given that the Notice to Cure and Mars 2112's violation of the Lease are clear. Defendant contends that the Lease permits Mars 2112 to "use and occupy the premises solely for the operation and maintenance of a high quality public sit-down table service tablecloth restaurant" and prohibits Mars 2112 from the "use or occupancy of the premises other than" for that limited purpose. The Lease also prohibits Mars 2112 from using the premises in "any manner . . . which in the judgment of [defendant], shall in any way impair the character, reputation or appearance of the Building as a high quality office building . . . ."

In late 2001, Mars 2112 defaulted on its rent obligations and filed for bankruptcy. Mars 2112 then began hosting hip-hop and other similar-themed parties at the premises on the weekends. Following a stabbing incident at the premises, defendant moved the Bankruptcy Court for order enjoining Mars 2112 from hosting any further parties or events. In exchange for defendant's withdrawal of the defendant's injunction application, Mars 2112 and defendant entered into a stipulation whereby Mars 2112 agreed to the following:

> after December 31, 2002, [Mars 2112] shall not host any Events or other functions substantially similar to the Events, regardless of the type of music or theme, at the Premises without the express written consent of [defendant] in its sole and absolute discretion and shall only use the Premises as provided in the Use Provisions or other provisions in the Lease.

"Events" is defined in the Stipulation as:

> certain hip-hop/rap special functions, including without limitation the 'Planet Rock' functions and other events sponsored by the Power 105.1 radio station (the 'Events') that have taken place at the Premises.

Defendant contends that the parties have always recognized that defendant's consent to events or functions hosted by Mars 2112 was necessary. Defendant asserts that since January 2003, Mars 2112 has regularly submitted for defendant's approval monthly calendars of all proposed events and defendant permitted such events in an effort to assist Mars 2112 in emerging from bankruptcy. However, in 2006, at least six NYPD complaints were filed, which involved violent assaults occurring within or just outside the premises. At 3:40 a.m on February 3, 2007, a partygoer at a Mars 2112 event was "struck with unknown object causing large deep lacerations" to his head.

In light of the above, defendant emailed Mars 2112 later that day, stating:

> You are to cease and desist from having any parties in Mars starting immediately. If you have a party or parties scheduled this weekend, you shall cancel them immediately. We are prepared to go to Court and obtain an emergency injunction to prevent you from holding any events. We will hold you default of your lease.

At Mars 2112's request, the parties held a meeting on February 8, 2007, at which Mars 2112 agreed to cancel its events for the weekend of February 16th, but continued to press for weekend parties in the future. When Mars 2112 subsequently requested the defendant provide a response to its request at the meeting, defendant sent Mars 2112 a reply, stating that it "did not approve any of your parties listed on your schedule for Feb. In addition, on Feb. 3, 2007, I emailed you demanding that all parties cease. Therefore, I do not expect that you will be proceeding with the parties."

In response, Mars 2112 advised defendant that it cancelled its evening events "this past weekend" of February 16th, and requested that defendant approve future events, which in the opinion of Mars 2112, "are [not] prohibited by the lease or bankruptcy stipulation . . . " Mars

2112 also advised that it had "no choice but to proceed with these future events since we cannot afford any further cancellations." Mars 2112 later advised that it intended to proceed with its events scheduled for the weekend of February 23, which "are no different that any of our events held since Nov 2002." A private investigator hired by defendant detected drug use and underage patrons during the events held on that weekend at the premises.

After the Notice to Cure was served on March 1st, Mars 2112 hosted two additional hip-hop/R&B parties on March 2 and 3, 2007, at which the private investigator again detected drug use and underage patrons.

Defendant argues that the Notice to Cure was facially valid, in that it sufficiently apprises Mars 2112 of the sections of the Lease that were breached and advises that the holding of "functions that impair the character of the Building" constituted the default. However, in the event the Court determines that the Notice to Cure is lacking, caselaw provides that the correspondence and communication between the parties prior to notice permitted Mars 2112 to fully appreciate the nature of the breach with which it was charged. The claim by Mars 2112 that it cannot determine how to cure its default is disingenuous, in light of defendant's repeated reminders that "no 'events' may be held in the Premises unless and until [it] consent[s] to them." Furthermore, defendant argues, Mars 2112 breached the "restaurant" use provision of the Lease and the Stipulation's proscription against hip-hop/rap and similar events. Nor are Mars 2112's defaults excused under any theory of waiver, estoppel, laches, or course of dealing, and defendant's withholding of its consent was not unreasonable. Thus, dismissal of the complaint is warranted.

In opposition to the cross-motion, Mars 2112 contends that the Notice to Cure fails to

mention the Stipulation and Bankruptcy Court order. Further, the current "functions" being held at the Premises are not "Events" or "substantially similar to the Events," and thus, consent of the Landlord is not required. Also, of the six incidents, only three were inside the Premises and two of these three incidents involved security personnel removing unruly patrons. Since January 2006, there were 114 functions and only one incident was inside and unrelated to security personnel removing unruly patrons. The record is barren of any fact which would tend to establish the character and reputation of the Building, and issues of fact exist as to whether Mars 2112 violated the Lease. And, the Landlord failed to meet its burden establishing that the use restriction contained in the Stipulation bars Mars 2112 frm conducting the same type of functions that Landlord has condoned for years.

ANALYSIS

To obtain *Yellowstone* relief, the tenant must demonstrate that (1) it holds a commercial lease; (2) it has received from the landlord a notice of default, a notice to cure, or a threat of termination of the lease; (3) the application for a temporary restraining order 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 (*see, First Natl. Stores v. Yellowstone Shopping Ctr.*,21 N.Y.2d 630, 290 N.Y.S.2d 721, 237 N.E.2d 868 [1968]). Courts have granted *Yellowstone* injunctions "to avoid forfeiture of the tenant's interest" and have generally accepted far less than the showing normally required for the grant of preliminary injunctive relief (*Garland v. Titan West Assocs.*, 147 A.D.2d 304, 543 N.Y.S.2d 56 [1st Dept 1989] *citing Post v. 120 E. End Ave. Corp.*, 62 N.Y.2d 19, 25, 475 N.Y.S.2d 821).

The purpose of a *Yellowstone* injunction is to maintain the *status quo* so that the tenant

served with a notice to cure an alleged lease violation may challenge the propriety of the landlord's notice while protecting a valuable leasehold interest (*First Nat. Stores v. Yellowstone Shopping Center, supra*; *Ameurasia Int. Corp. v. Finch Realty Co.,* 90 A.D.2d 760, 455 N.Y.S.2d 900; *Podolsky v. Hoffman,* 82 A.D.2d 763, 441 N.Y.S.2d 238.).

The purpose of a notice to cure is to "apprise the tenant of claimed defaults in its obligations under the lease and of the forfeiture and termination of the lease if those defaults [are] not cured within a set period" (*200 West 58th Street LLC v. Little Egypt Corp.*, 3/9/2005 N.Y.L.J. p. 19, col 1 (N.Y.C. Civ. Ct., Billings, J.) *citing Filmtrucks, Inc. v. Express Indus. & Term. Corp.,* 127 A.D.2d 509, 510 [1st Dept. 1987], *One Main v. Le K Rest. Corp.*, 1 A.D.3d 365, 366 [2d Dept. 2003] and *Oswego Props. v. Campfield*, 182 A.D.2d 1058, 1060 [3d Dept 1992]). The notice to cure must inform the tenant unequivocally and unambiguously as to how the tenant has violated the lease and the conduct required to prevent eviction (*200 West 58th Street LLC v. Little Egypt Corp., citing Chinatown Apts. v. Chu Cho Lam*, 51 N.Y.2d 786, 788 [1980]; *Greenfield v. Etts Enters.*, 177 A.D.2d 365 [1st Dept 1991]; *Garland v. Titan W. Assocs.*, 147 A.D.2d 304, 310-11 [1st Dept 1989]). The standard for determining if a precatory notice is sufficient "is one of reasonableness in view of the attendant circumstances" (*Hughes v. Lenox Hill Hosp.*, 226 A.D.2d 4, 18, 651 N.Y.S.2d 418 [1st Dept 1996]).

Alleged Lease Violations:

> Section 3.01. Tenant shall not use the premises . . . in any manner which would violate the Certificate of Occupancy for the Building or, for any purpose other than the use hereinbefore specifically mentioned. Those portions, if any, of the premises, identified as toilets and utility areas shall be used by Tenant only for the purposes for which they are designed. Tenant's employees shall be permitted to utilize the common area bathrooms on the 1C level.

Section 3.01 of the Lease prohibits actions by Mars 2112 that violate (1) the Certificate of Occupancy of the Building, (2) the use provision of the Lease, (3) improper use of "toilets and utility" areas, and arguably, (4) common area bathrooms on building levels other than those located on "1C." The Notice to Cure, however, fails to set forth which portion of section 3.01 has been purportedly violated, or the manner in which Mars 2112 allegedly violated any portions of section 3.01. Therefore, mere citation to section 3.01 of the Lease, without more, is insufficient to apprise Mars 2112 of the conduct necessary to avoid eviction of the premises. Thus, any alleged violation of section 3.01 as stated in the instant Notice to Cure cannot serve as a basis for termination of the Lease.

> Section 3.02. Tenant . . . . shall not suffer or permit the premises . . . to be used in any manner . . . which, in the judgment of Landlord [defendant], shall in any way impair the character, reputation or appearance of the Building as a high quality office building . . . ."

Section 3.02 does not specify which types of uses constitutes an impairment of the character and reputation of the Building, but instead, leaves such determination to the sole "judgment" of defendant. Thus, any facts which might give rise to a default under this section remains within the sole knowledge of the defendant. Yet, without any degree of specificity, the Notice to Cure merely states that Mars 2112 is "using the Premises for functions that impair the character and reputation of the Building." The Notice to Cure fails to disclose any acts undertaken by Mars 2112 which, in the "judgment" of defendant, violates such section. Since one cannot reasonably determine what conduct purportedly constitutes a violation of section 3.02, its alleged violation of section 3.02 cannot serve as a basis for eviction.

The Landlord's contention that the evidence extrinsic to the Notice to Cure may be considered in assessing the sufficiency of the Notice to Cure is unpersuasive. In determining whether a Notice to Cure is valid, the courts look to the face of the notice and may not look beyond the Notice to resuscitate a notice that is otherwise defective on its face (*see Chinatown Apartments, Inc. v. Chu Cho Lam, supra; Goodhue Residential Co.* v. *Lazansky, I* Misc.3d 907, 781 N.Y.S.2d 624 (Civ. Ct. N.Y. Co. 2003) *citing Domen Holding Co. v. Aranovich,* 1 N.Y.3d 11 7, 769 N.Y.S.2d 785 (2003) (a notice "must be 'adequate' on its face"). *728 Property Assocs. v. Millard,* NYLJ, Aug. 29, 1990, at 22, col 4 [Civ Ct, N.Y. County] [rejecting petitioner's claim that he can provide witness testimony as to the acts alleged in the notice alleging nuisance is insufficient to cure the defective notice which asserted conclusory assertions such as the use of the term "unsavory characters" to define individuals]).

In this regard, defendant's reliance on the Nassau County District Court's decision in *White Angel Realty v. Asian Bros. Corp.* (183 Misc. 2d 674, 706 N.Y.S.2d 583 [2000]), wherein the court considered extrinsic evidence in determining the sufficiency of a predicate notice, is unpersuasive. Even by the District Court's own acknowledgment, there is no caselaw supporting the decision to allow extrinsic evidence (183 Misc. 2d at 677). Furthermore, unlike the *White Angel Realty* case, it cannot be said that the correspondence exchanged herein allowed Mars 2112 to fully appreciate the nature of the alleged breaches claimed in the Notice to Cure. The email dated February 3, 2007 directs Mars 2112 to "cease and desist from having *any parties*" (emphasis added). However, the submissions indicate that Mars 2112 held various types of "events" such as product launches, video shoots, tour groups "Make-A-Wish Foundation" events, to which the Notice to Cure may arguably apply.

The Court also notes that a landlord's notice to a stabilized tenant that merely tracked the language in Rent Stabilization Code, § 2524.4[a][1] for nonrenewal upon the ground of owner occupancy, without setting forth fact-specific allegations, is insufficient to serve as a predicate for eviction proceedings (*Numano v. Vicario*, 165 Misc.2d 457, 632 N.Y.S.2d 926 N.Y.Sup., 1995] *citing Berkeley Assocs. Co. v. Camlakides,* 173 A.D.2d 193, 569 N.Y.S.2d 629, affd. 78 N.Y.2d 1098, 578 N.Y.S.2d 872, 586 N.E.2d 55). Except for the addition of the word "functions," the Notice to Cure, merely tracks the language contained in the Lease. Therefore, although the Rent Stabilization Code is not at issue herein, the Notice to Cure, is by analogy, insufficient to appraise Mars 2112 of the manner in which a cure can be accomplished.

> Section 3.03. If any governmental license or permit shall be required for the proper and lawful conduct of Tenant's business or other activity carried on in the premises, and if the failure to secure such license or permit might or would, in any way, affect Landlord, then Tenant . . . shall duly procure and thereafter maintain such license or permit . . . . Except as may otherwise be expressly provided for herein, Tenant covenants and agrees that it shall not make . . .any application or inquiry with any governmental agency . . . which may affect or relate to the certificate of occupancy/zoning for the Building in connection with its desire to utilize the Well Area . . . .

The Notice to Cure is silent as to any license or permit that Mars 2112 purportedly failed to either secure or maintain. Nor does the Notice to Cure specify whether Mars 2112 violated section 3.03 by making any application or inquiry that relates to the certificate of occupancy or zoning with respect to the "Well Area." Thus, as the alleged violation of section 3.03 is vague and imprecise, citation to section 3.03 in the instant Notice to Cure cannot serve as a basis for eviction.

> Section 5.01. Tenant covenants and agrees that Tenant will:
> (m) Not operate its business in such a fashion as to interfere with the normal operation and maintenance of a first-class office building in mid-town Manhattan.

Section 5.01 is drafted broadly, and thus, citation to this section, in and of itself, is insufficient to give Mars 2112 adequate notice of its alleged default. The Notice to Cure fails to identify in what manner Mars 2112 operates the premises that interferes with the operation or maintenance of the 48 story-building at issue. Instead, Mars 2112, as well as this Court, is left to speculate which operation of or maintenance procedure at the Building has been interfered with by the conduct of Mars 2112.

Therefore, the alleged violation of section 5.01 as noted in the Notice to Cure cannot serve as a basis for eviction.

> Section 9.01. Tenant . . . shall comply with all laws and ordinances, and all rules, orders and regulations of all governmental bodies . . . .

Again, citation to such a general provision of the Lease, without identifying the particular rule, order, or governmental regulation violated, or the conduct which is purportedly violative of any such rule, order or governmental regulation, is wholly insufficient. Thus, the alleged violation on section 9.01 as stated in the Notice to Cure cannot serve as a basis for eviction.

> Section 32.02. Tenant hereby covenants and agrees that the business to be conducted by Tenant . . . will be reputable in every respect, and that the sales methods to be employed by Tenant in said business as well as all other elements of merchandising, display and advertising, will be dignified and in conformity with the highest standards of practice obtaining amongst first-class restaurants in the Borough of Manhattan, City of New York, and that the kind and quality of the food and beverages served in the restaurant shall be in keeping with such standards. . . .

Section 32.02 of the Lease requires that Mars 2112 not only conduct a "reputable" business, but that it advertises its business in a dignified manner, consistent with other first-class restaurants in Manhattan. Thus, citation to section 32.02 alone, without identifying whether the business is considered disreputable or whether Mars 2112 failed to advertise or market its

business in a "dignified" manner, is ambiguous. Furthermore, the mere allegation in the Notice to Cure that Mars 2112 is "using the Premises for functions that impair the character and reputation of the Building the Notice" is conclusory, vague, and imprecise, such that one cannot ascertain which functions must cease in order to prevent eviction.

> Section 32.04. Tenant agrees not to offer live or recorded music, entertainment or other sound reproduction at the premises if (a) the music, entertainment or sound as reproduced . . . are of such a level so as to constitute a nuisance or . . . [is] disturbing to the Building's occupants and Tenants, (b) the same is not permitted by law and/or (c) the same violates any other provision of this Lease.

Once more, the Notice to Cure is silent as to music, in any form, as to any law violated by any such music, or any disturbance to the Building's occupants. Thus, the Notice to Cure's mere citation to section 32.04 alone, is vague and insufficient to support an eviction proceeding against Mars 2112.

Even assuming that any of the sections cited to in the Notice to Cure was sufficiently supported by factual allegations, such a partially valid notice to cure is insufficient as a condition precedent to an eviction proceeding (*see 200 W. 58th St. LLC v Little Egypt Corp.*, NYLJ 3/9/05 p. 19, c. 1, N.Y.C. Civ. Ct. [Billings, J.]["The right to terminate a tenancy is conditioned upon a fully valid predicate notice. Confusing notices that cite inadequate grounds for termination, whether contradictory or lacking in specificity, may not provide the predicate for a summary holdover proceeding]).

In sum, except for section 3.02, none of the cited provisions of the Lease expressly prohibit the conduct complained of, *to wit*: "using the Premises for functions that impair the character and reputation of the Building. . . ." Further, several sections of the Lease to which Landlord cites in the Notice to Cure refer to various rights and obligations of Mars 2112. In the

absence of factual allegations giving rise to the purported defaults, the Notice is impermissibly vague (*see Empire State Bldg. Associates v. Trump Empire State Partners* 245 A.D.2d 225, 667 N.Y.S.2d 31 [1st Dept 1997] [granting *Yellowstone* relief and stating that "the notice of default, which consisted of a brief statement that Empire [commercial tenant] violated Article 8 of the lease by filing unspecified false and fraudulent papers in relation to the Local Law 5 variance, was so vague and ambiguous as to be ineffective"]). Accordingly, *Yellowstone* relief is warranted.

Based the above, the Court does not reach the parties' remaining arguments.

Conclusion

It is hereby

ORDERED that the order to show cause for a *Yellowstone* preliminary injunction tolling Mars 2112's time to cure pursuant to the notice of default is granted, on the grounds that the notice to cure at issue is facially insufficient and defective; and it is further

ORDERED that defendant's cross-motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that Mars 2112 serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 18, 2007

Hon. Carol Robinson Edmead