

Mark Hotel LLC v Madison Seventy-Seventh LLC

2007 NY Slip Op 32584(U)

August 14, 2007

Supreme Court, New York County

Docket Number: 0103824/2007

Judge: Emily Jane Goodman

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

PRESENT: **EMILY JANE GOODMAN**

PART 17

Justice

MARK HOTEL LLC

INDEX NO. 163824/07

MOTION DATE _____

- v -
MADISON SEVENNY - SEVENTH LLC

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided per

attached

FILED
AUG 21 2007
COUNTY CLERK'S OFFICE
NEW YORK

14
8/14/07

Dated: [Signature]

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

EMILY JANE GOODMAN

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I. A. S. PART 17

-----X

MARK HOTEL LLC,

Plaintiff,

Index No. 103824/07

-against-

MADISON SEVENTY-SEVENTH LLC,

Defendant.

-----X

EMILY JANE GOODMAN, J.S.C.:

Plaintiff Mark Hotel LLC (the Hotel) operates a luxury hotel located at 25 East 77th Street, New York, New York (the premises), as tenant, pursuant to a lease which will not expire until 2131 (the lease). Defendant Madison Seventy-Seventh LLC (Madison) is the owner and landlord of the premises. Madison served plaintiff with a notice of default of the lease on March 7, 2007, causing plaintiff to bring this motion for a *Yellowstone* injunction.

The Hotel is involved in a \$150 million project to renovate the premises to include luxury hotel condominiums. Madison, insisting that the Hotel has no right under the lease to alter the premises to include this type of accommodation, seeks to oust the Hotel, and recapture the premises. In the present motion, the Hotel argues that it meets the qualifications for a *Yellowstone* injunction, and that the lease clearly permits the use to which the premises will be put.

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The purpose of a *Yellowstone* injunction is to allow the tenant confronted by a threat of termination of the lease to obtain a stay tolling the running of the statutory cure period so that, after a determination of the merits of any action arising under the lease, the tenant may cure the defect and avoid a forfeiture of the leasehold.

Hempstead Video Inc. v 363 Rockaway Associates, LLP, 38 AD3d 838, 838-839 (2d Dept 2007); citing *First National Stores, Inc. v Yellowstone Shopping Center, Inc.*, 21 NY2d 630 (1968). A *Yellowstone* injunction follows a showing that the tenant holds a commercial lease; that it has received a “notice of default, notice to cure, or threat of termination of the lease” (*Hempstead Video. Inc. v 363 Rockaway Associates, LLP*, [38 AD3d at 839]); that it brought the application for a temporary restraining order prior to the expiration of the cure period and termination of the lease; and that the tenant has shown a “desire and ability” to cure the default “by any means short of vacating the premises.” *Id.*; see also *3636 Greystone Owners, Inc. v Greystone Building*, 4 AD3d 122, 123 (1st Dept 2004)(tenant must show that it is “prepared and able” to cure); *TAG 380, LLC v Sprint Spectrum, L.P.*, 290 AD2d 404 (1st Dept 2002).

The Hotel has established its right to a *Yellowstone* injunction, having met all of the above criteria. It holds a particularly valuable commercial lease; has received a notice of default; has made a timely motion; and has shown its willingness to cure its alleged violation of the lease, by tailoring its project to fit Madison’s interpretation of the lease, by omitting the luxury condominium units, if necessary.

Madison urges that the Hotel is not sincere in its claim that it will cure the alleged violation of the lease, as evidenced by the fact that the Hotel is proceeding with the project apace. Madison suggests that the only way that the Hotel can show that it intends to cure, if necessary, would be to stop working on the renovations until the dispute is resolved.

Madison presents several cases for the proposition that a tenant should not be awarded a *Yellowstone* injunction if it cannot show a good faith desire to cure. However, these cases are distinguishable.

In *Metropolis Westchester Lanes, Inc. v Colonial Park Homes* (187 AD2d 492, 493 [2d Dept 1992]), the tenant conceded that it had no intention of making the repairs sought by the landlord, and so, lacked the “willingness” to cure. The tenant in *American Airlines, Inc. v Rolex Realty Company, Inc.* (165 AD2d 701 [1st Dept 1990]) made its application after the time to cure had passed, and did not, as does the tenant herein, “demonstrate[] a willingness and ability to cure.” *Id.* at 703. In *Linmont Realty, Inc. v Vitocarl, Inc.* (147 AD2d 618, 620 [2d Dept 1989]), the tenant made “no offer to cure,” at all, but instead, merely disputed the allegations of default under its lease. The *Linmont* Court determined that, under the circumstances, the tenant had failed to make a “good-faith showing of a willingness to cure.” *Id.* Finally, in *Cemco Restaurants, Inc. v Ten Park Avenue Tenants Corp.* (135 AD2d 461, 463 [1st Dept 1987]), the Court found the tenant’s violations to be so “blatant,” that a good faith willingness to cure could not be shown. *Id.* at 461-462. Such is not the situation at bar.

In the present case, the court finds that the Hotel has offered, in good faith, to alter its planned usage for the premises, should Madison prove its case, and has not shown a “blatant” refusal to cure. This court finds that the Hotel has shown the desire and ability to cure, sufficient to warrant the grant of a *Yellowstone* injunction.

Based on the nature of the dispute, a bond “rationally related to the damages defendant might suffer should the court later determine that the injunctive relief was not warranted” is appropriate. *3636 Greystone Owners, Inc. v Greystone Building* (4 AD3d at 123).

Accordingly, it is

ORDERED that plaintiff Mark Hotel LLC’s motion for a *Yellowstone* injunction is granted; and it is further

ORDERED that defendant Madison Seventy-Seventh Street LLC, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from taking any action to cancel or terminate the lease based on Notices to Cure; and it is further

ORDERED that plaintiff post a bond in the amount of \$ 200,000 (which amount was agreed to by the parties pursuant to letter dated July 20, 2007) upon receipt of a copy of this Decision with Notice of Entry.

This Constitutes the Decision and Order of the Court.

Dated: ^{August}~~September~~ 4, 2007

ENTER:



J.S.C.
EMILY JANE GOODMAN

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AUG 21 2007
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