MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

X	INDEX NO. 3992/07
KAYGREEN REALTY CO., LLC	MOTION SEQ. NO. 1
- against -	BY: KITZES, J.
IG SECOND GENERATION PARTNERS, L.P., et al.	DATED: September 4, 2007
X	

In this action for a declaratory judgment and specific performance of an option to purchase, plaintiff Kaygreen Realty Co., LLC (Kaygreen) seeks a Yellowstone injunction to stay the cure period provided under Article XXVI of the subject lease.

The rights and obligations of the litigants are governed by the original lease dated February 11, 1948 and a supplemental indenture dated January 1, 1979 entered into by the parties' predecessors in interest for the commercial premises located at 89-41 164th Street, Jamaica, New York. The parties herein have been involved in protracted litigation dating back to 1991. The current issue before the court pertains to Kaygreen's attempt to exercise its option to purchase, by notice dated December 18, 2006 and the subsequent notice of rejection by defendants dated December 29, 2006.

The option to purchase was triggered pursuant to Article XXV, Section (e) of the lease when Kaygreen was notified that the lease would not be extended beyond December 31, 2008.

Article XXVI, Section 1 provides that the right to purchase could be exercised only upon the following terms and conditions:

> (a) That at the time of the exercise of such right the Tenant is not in default in the performance of any of the terms, covenants, conditions, provisions or agreements of this lease, unless such default is not substantial and is cured within sixty (60) days from the date notice of the exercise of the option to purchase the Demised Premises is given pursuant to subparagraph (c) of this Section 1;
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> (b) That the Demised Term shall have been duly extended to December 31, 2008, in accordance with the provisions of Article XXV of this lease; and
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> (c) That on or before December 31, 2006, the Tenant shall notify the Landlord of its election to exercise the right to purchase the Demised Premises and deposit with the Landlord an amount equal to two times the then annual rent hereunder which amount shall be retained by the Landlord, without obligation to pay interest thereon or make any refund thereof; ...
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> Section 2. Despite the provision of the foregoing Section 1, the Tenant shall not be entitled to purchase the Demised Premises under this Article if on December 31, 2008 the Tenant shall be in default in the performance of any of the terms, covenants, conditions, provisions and agreements of this lease or if this lease shall have been terminated prior to said date.

The option rejection notice references, inter alia, the failure to participate in the appraisal process for setting rent required under Article XXV, Section 4 of the lease, as listed in the March 19, 2000 notice of default (actual notice dated March 17,

2000), a substantial default by failing to pay admitted additional rents back to January 1, 1994, a separate notice of default dated April 4, 2003 which includes but is not limited to the failure to maintain elevators and/or elevator equipment, the existence of violations in the Furniture World and Jimmy Jazz stores and the failure to deposit two times the annual rent as a down payment for the purchase of the premises.

On July 11, 2002, a Yellowstone injunction was granted in favor of Kaygreen in the Supreme Court, Queens County action entitled Kaygreen Realty Co. v IG Second Generation Partners, L.P., et al. (Index No. 7556/01) with respect to the March 17, 2000 notice of default. By order dated November 18, 2003, that action was consolidated with a prior declaratory judgment action under the earlier action's caption and index number, IG Second Generation Partners L.P., et al. v Kaygreen Corp., et al. (Index No. 28683/99). These actions raised a common issue concerning the fixing of rent for the lease term beginning January 1, 1994 through the participation in the appraisal procedure set forth under Article XXV, Section 4 of the lease.

By order dated October 3, 2005, the Appellate Division, Second Department modified the November 18, 2003 order and declared among other things that Kaygreen was obligated to participate in the appraisal process and further stated that the unpaid rent owed could not be determined until completion of that process.

Thereafter, Kaygreen instituted another declaratory judgment action against defendants under Index No. 13633/03 with respect to the default notice dated April 4, 2003 and was again granted a Yellowstone injunction by order dated September 16, 2004. As a result of the foregoing Yellowstone injunctions, no action could be taken by defendants to terminate Kaygreen's lease until the issues raised therein were resolved.

With respect to Kaygreen's request for Yellowstone relief in this action, it is argued that the necessity for this remedy is to allow Kaygreen to stay the 60-day cure period set forth in Section (a) of the option clause in the event defaults are eventually declared and not to extend its time to exercise the option itself as contended by defendants.

Yellowstone injunctions are frequently granted to avoid forfeiture of a commercial lease prior to the resolution of the merits of defaults claimed by a landlord. (See, First Natl. Stores v Yellowstone Shopping Ctr., 21 NY2d 630 [1968]; TSI West 14, Inc. v Samson Assoc., LLC, 8 AD3d 51 [2004]; Purdue Pharma, LP v Ardsley Partners LP, 5 AD3d 654 [2004].) However, in the instant case, it is undisputed that the lease was not extended and will properly terminate on December 31, 2008. It is this termination which has triggered the option clause at issue. As a result, the only remedy possibly available to Kaygreen would require the satisfaction of the elements of a traditional injunction. (Aetna Ins. Co. v

Capasso, 75 NY2d 860 [1990]; Coinmach Corp. v Alley Pond Owners Corp., 25 AD3d 642 [2006].)

Under Article XIV of the subject lease the landlord is required to serve a written notice to the tenant specifying any defaults which must be remedied within 60 days thereafter. Based on this language, any failure by the landlord to provide notice of an alleged default will also preclude reliance on it to defeat the exercise of an option to purchase. (2M Realty Corp. v Boehm, 204 AD2d 620 [1994]; Cinema Dev. Corp. v Two Thirty Eight Realty Corp., 149 AD2d 648 [1989].) Thus, any unnoticed defaults set forth in defendants' notice of rejection dated December 29, 2006 cannot be considered.

However, the option to purchase under Section 1(a) of Article XXVI is conditioned on the tenant not being in default "at the time of the exercise of such right... unless such default is not substantial and is cured within sixty (60) days ...." On December 18, 2006, the date the option was exercised, the defaults contained in the March 17, 2000 and April 4, 2003 notices had not yet been resolved. Thus, Kaygreen's deposit of twice "the then annual rent" in the amount of $100,000 was in conformance with the terms of the lease at that time. This court has been informed that the appraisal process was completed on June 19, 2007 when it was determined that the annual fair market rent effective January 1, 1994 for the subject premises was $157,500.

Also, in accordance with the Appellate Division order, Kaygreen had begun to participate in the appraisal process before its exercise of the option. As held in Waldbaum, Inc. v Fifth Ave of Long Is. Realty Assoc. (85 NY2d 600 [1995]), the diligent commencement of acts to cure a default by a tenant will permit a finding that the exercise of an option was valid. In Waldbaum, the issue of substantial compliance with the default provision and reasonable diligence in the efforts to cure was remitted to the Supreme Court for an evidentiary hearing. In contrast to Waldbaum, the court in Nobu Next Door, LLC v Fine Arts Hous. (4 NY3d 839 [2005] affg 3 AD3d 335 [2004]), found the performance of repairs to an exhaust chimney was deferred on the basis of a business judgment and under these facts it declined to issue equitable relief to extend the time in which to exercise the lease renewal option.

As stated above, Yellowstone injunctions protect Kaygreen from the termination of the lease based on defaults set forth in the March 17, 2000 and April 4, 2003 notices until the resolution of these issues. Due to the valid cancellation of the lease by defendants as of December 31, 2008, any future termination based on currently unresolved but noticed defaults, is only relevant up and until December 31, 2008. Thereafter, Kaygreen possesses no right to remain in the premises as a tenant. Declarations at the eventual trials of the pending actions, will determine whether Kaygreen was in substantial default or whether the efforts

undertaken to correct defaults constituted substantial compliance with its obligation on the actual date it exercised the option. Absent a determination in favor of Kaygreen on all noticed defaults the exercise of the option will be rendered void.

The 60-day cure period under Section 1(a), pertains only to non-substantial noticed defaults which existed on the date the option was exercised. The likelihood of Kaygreen's success on the merits, on this issue cannot be assessed at this juncture. However, injunctive relief is necessary to preserve the status quo with respect to the 60-day cure period, if it is eventually determined that Kaygreen has only outstanding non-substantial defaults. (See, Kelly v Garuda, 36 AD3d 593 [2007]; Ruiz v Meloney, 26 AD3d 485 [2006].)

Accordingly, Kaygreen's request for an injunction is granted solely to the extent set forth above and is conditioned upon 1) full payment, no later than 30 days after service of the order to be entered hereon, of rental arrears dating back to January 1, 1994 to be calculated by the appraised annual fair market rate of $157,500 and 2) the timely payment of future monthly rentals at the appraised rate and continued compliance with all the terms and conditions of the subject lease. The foregoing is further conditioned upon plaintiff providing an undertaking in accordance with CPLR 6312, which amount along with arrears shall be fixed in the order to be entered hereon. Upon settlement of the

order, the parties may submit proof and recommendation as to the amount of the undertaking.

All other requests for relief are denied.

Settle order.

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J.S.C.