Leemilt's Petroleum, Inc. v Pathmark Stores, Inc.
2007 NY Slip Op 33562(U)
October 29, 2007
Supreme Court, Nassau County
Docket Number: 9818-07/
Judge: Stephen A. Bucaria
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA
Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

LEEMILT'S PETROLEUM, INC.,

Plaintiff,

INDEX No. 9818/07

MOTION DATE: Sept. 25, 2007
Motion Sequence # 002

-against-

PATHMARK STORES, INC.,

Defendant.

The following papers read on this motion:

Order to Show Cause................................ X
Affidavit in Opposition............................. X
Reply Affidavit..... X
Memorandum of Law.................................. XX
Reply Memorandum of Law........................ X

This motion, by plaintiff, brought on by order to show cause, for an order pursuant to CPLR 2221, granting reargument and renewal and reinstating the Yellowstone Injunction pending determination of this case on the merits, is determined as hereinafter set forth.

FACTS

This Court has previously decided the original application and related the underlying facts of this case in the prior order dated August 23, 2007.

On May 22, 2007, the plaintiff ("Leemilt") and the defendant ("Pathmark") entered into a tolling agreement. That agreement stated that the Notice to Cure was to be tolled till June 6, 2007. On May 30, 2007, the parties entered into a stipulation which granted Leemilt a Yellowstone Injunction <u>on</u> <u>consent</u>, restraining Pathmark from terminating the sublease agreement ". . .pending the hearing and determination of an application of a <u>preliminary injunction</u> of this of this motion on the merits. . ." (emphasis supplied).

In its Affirmation of Emergency, submitted on June 4, 2007, Leemilt requested the Court to order a preliminary injunction and grant the Yellowstone Injunction on Consent (pursuant to the stipulation), so that it remain in place. On June 5, 2007, in the Order to Show Cause, this Court ordered that pursuant to the stipulation between the parties, Pathmark was "...stayed, enjoined and restrained from terminating the sublease and from commencing a proceeding for non-payment of rent or eviction against Leemilt". (OSC June 5, 2007). After submission, the Court then denied Leemilt's request for preliminary injunction as a result of Leemilt's inability to demonstrate that it had suffered irreparable harm, a requirement for a preliminary injunction. The Court's order was dated August 23, 2007, and the order was entered on August 28, 2007. On September 7, 2007, Leemilt was granted a "temporary stay" by Justice Warshawsky, who signed the instant Order to Show Cause, preventing Pathmark from seeking eviction or termination of the sublease.

<u>PLAINTIFF'S CONTENTIONS</u>

Leemilt is seeking to reargue and renew its entitled to a Yellowstone Injunction and preliminary injunction, asserting that it is entitled to reargue the issue of a Yellowstone injunction because this Court "misapprehended" the requirements for the issuance of a Yellowstone injunction. Leemilt argues that it has met those requirements, and this Court misapplied the irreparable harm requirement applicable to a preliminary injunction, and applied it to a Yellowstone injunction. Moreover, since the Yellowstone injunction was not granted, Pathmark is able to commence a summary proceeding and evict Leemilt and its sub-tenant even though the matter has not yet been determined. Thus, if Leemilt prevails at trial, the lease would already be terminated, Leemilt will have been evicted and a victory for the plaintiff in this matter at trial would be futile.

Leemilt argues that reargument of the preliminary injunction application is appropriate. Leemilt argues that this Court "incorrectly determined that Leemilt would not suffer irreparable harm." The parcel of land is unique and it is sub-subleased to a third party gas station. If Pathmark seeks eviction proceeding, the lease between Leemilt and the third

party will be terminated. The third party will be forced to remove underground equipment, making it impossible to resume service if Leemilt ultimately prevails. Thus, if Leemilt is evicted, it will suffer irreparable injury.

The plaintiff contends that its motion to renew should be granted because it is based on new facts that would change the Court's prior determination; that details of its sub-sublease with the third party, including how rent was set and that the sub-subtenant would be evicted absent a Yellowstone injunction was not before the Court at time of the original hearing and therefore warrants renewal.

DEFENDANT'S CONTENTIONS

Pathmark contends that Leemilt is not entitled to a Yellowstone injunction, re-argument, nor renewal. Pathmark argues that the Court cannot issue a Yellowstone injunction since the default (failure to pay rent) cannot be cured. The default cannot be cured because the cure period (10 days) has run. The cure period was ten days, which commenced on August 23, 2007 and expired on September 4, 2007. Leemilt did not cure the default during that period and the "stay" granted by Justice Warshawsky on September 7, 2007 was of no legal force or effect because Leemilt was incapable of curing its default since the cure period had already expired. Therefore, Leemilt is not entitled to a Yellowstone injunction.

The defendant further contends that Leemilt is not entitled to reargue the denial of its prior motion seeking injunctive relief because it has not established that this Court overlooked or misapprehended any of the facts or the applicable law, and that the plaintiff never demanded a Yellowstone injunction prior to the filing of the instant motion. Counsel for the defendant argues that Leemilt's original motion by Order to Show Cause and this Court's decision confirm that fact. Therefore, since Leemilt never sought Yellowstone relief in the first instance, it cannot reargue the Court's misapprehension of the requirements for an issuance of a Yellowstone injunction. Alternatively, counsel argues that Leemilt cannot reargue the issuance of a preliminary injunction, because the Court correctly ruled that Leemilt will not suffer irreparable harm. Regardless of the uniqueness of the parcel or the fact that a sub tenant third party is now in possession of the property, Leemilt is still capable of curing the default through payment of rent, and therefore has not suffered irreparable harm.

Nor, counsel contends, is the plaintiff entitled to renewal; Leemilt has not established any new facts that were not before the Court when it made its decision. Leemilt's argument

for renewal is not significantly different from its motion for re-argument. Leemilt uses the same argument that absent a Yellowstone injunction, it will be irreparably harmed.

PLAINTIFF'S REPLY

Counsel for the plaintiff asserts that Leemilt is entitled to a Yellowstone injunction because it was timely sought in its initial application; that the tolling agreement initiated the ten day time to cure on June 6, 2007; and that Leemilt filed its order to show cause on June 5, 2007, which the Court signed on the same day. She further asserts that once this Court's decision was entered on August 28, 2007, Leemilt had 10 days from that date to cure the default, and since Leemilt obtained a stay from this Court within the 10 days of the entry date of the decision, Leemilt is capable of curing the default, and therefore the original Yellowstone injunction remains in place until this Court decides on this motion. In response to Pathmark's assertion that Leemilt never sought Yellowstone relief in its initial application, Leemilt directs the Court's attention to its complaint filed on June 4, 2007, the Wherefore Clause in the Levy Affidavit dated May 21, 2007, the June 5, 2007 Order to Show Cause, and its Memorandum of Law dated June 4, 2007. Leemilt argues that in each of these documents it had specifically requested the Court to grant a Yellowstone injunction. Moreover, Leemilt states the criteria required for an issuance of a Yellowstone injunction and argues that the criteria has been met. The remainder of Leemilt's reply consists of the same assertions it made in its moving papers.

DECISION

It is well settled that reargument may only be granted where the court has overlooked or misapprehended some factual matter or legal authority (**Melendez v Methodist Hospital**, 203 AD2d 435, 610 NYS2d 855, 2nd Dept., 1994; see also, **Ebasco Constructors, Inc. v A.M.S. Construction Co. Inc.**, 195 AD2d 439, 599 NYS2d 866, Second Dept.,1993). It is within the discretion of the Court to grant a motion for reargument (**Lear v New York Helicopter Corp.**, 192 AD2d 645, 597 NYS2d 411, Second Dept., 1993; see also, **Swenning v Wankel**, 140 AD2d 428, Second Dept., 1988). However, reargument is not designed to permit a mere rehash of questions already decided (see, **Margulis v Teichman**, 127 Misc2d 168, Surr. Ct., Nassau County 1985; **Foley v Roche**, 68 AD2d 558, First Dept., 1979), or to afford the unsuccessful party successive opportunities to reargue issues previously decided (**William P. Pahl Equipment Corp. v Kassis**, 182 AD2d 22 (First Dept., 1992); see also, **Pro Brokerage, Inc. v Home Insurance Company**, 99 AD2d 971 (First Dept., 1984)).

Leemilt's motion to reargue its request for preliminary injunction must be **denied**.

> "It is well settled that to prevail on a motion for a preliminary injunction, the movant must demonstrate by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position (see, **Price Paper and Twine Co. v Miller**, 182 AD2d 748; **Walter Karl, Inc. v Wood**, 137 AD2d 22)."

(**Amana Express International Inc. v Pier-Air International, Ltd.**, 211 AD2d 606, 621 NYS2d 108, Second Dept., 1995). It is clearly stated in the previous decision by this Court, that Leemilt did not meet one of the requirements in obtaining a preliminary injunction when it failed to demonstrate that it would be irreparably injured absent granting of a preliminary injunction. The Court did not misapprehend or overlook any fact or law in its decision on that issue and will not permit a rehash of this question.

On deciding the Yellowstone injunction issue a thorough review of the documents submitted to the Court is necessary. According to Leemilt's papers, it did in fact ask for Yellowstone relief. The request is evident in Leemilt's Affirmation of Emergency, Verified Complaint, Memorandum of Law in Support of its Order to Show Cause, and Leemilt's Reply in Further Support of its Motion. Moreover, Leemilt did request relief in a timely manner, and is still entitled to a Yellowstone injunction. Leemilt obtained a stay from the Court within ten days of this Court's decision. The stay preserves Leemilts ability to cure the default, therefore the Court may still grant a Yellowstone injunction.

Leemilt argues, incorrectly, that the Court misapprehended the applicable legal authority in that it erroneously applied the elements of a preliminary injunction to a Yellowstone injunction. This Court did not treat the issue of a Yellowstone injunction in the decision entered on August 28, 2007, because the defendant did not specifically state the required elements of a Yellowstone Injunction; nor did the plaintiff argue that it satisfied those elements. Leemilt cannot assume it has a right to a Yellowstone injunction without arguing to the Court why it is entitled to one. Compounding the plaintiff's error, the defendant incorrectly argued that Leemilt was not entitled to a Yellowstone Injunction because Leemilt could not establish that it was likely to succeed on the merits of its claim. As a result, the Court did not treat the Yellowstone claim.

Leemilt's motion to renew is **denied**. A motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination and set forth a reasonable justification for the failure to present such facts on the prior motion. (**T & B Port Washington, Inc. v. McDonough** , 34 A.D.3d 785, 825 N.Y.S.2d 524, 2nd Dept., 2006); **CPLR 2221[e]**. Leemilt has not offered any reasonable justification for the failure to submit facts regarding the third party subtenant, and that portion of the motion to renew is **denied**.

> "A tenant seeking Yellowstone relief must demonstrate that (1) it holds a commercial least, (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 Center**, **supra**; **Pergament Home Centers v Net Realty Holding Trust**, 171 AD2d 736, 737, 567 NYS2d 292; **Linmont Realty v Vitocari, Inc.**, 147 AD2d 618, 620, 538 NYS2d 277; **Continental Towers Garage Corp. v Contowers Assocs. Ltd. Partnership**, 141 AD2d 390, 394, 529 NYS2d 322)".

(**Matter of Langfur**, 198 AD2d 355, 603 NYS2d 566, 567, 2nd Dept., 1993).

In this application, the plaintiff now, for the first time, asserts that it meets the four elements necessary for a Yellowstone injunction. Herein, in the exercise of its discretion, the Court treats this motion as an original Order to Show Cause for a Yellowstone injunction. The plaintiff has established the necessity for the maintenance of the status quo, and without a Yellowstone injunction, the plaintiff's tenancy will be terminated. It is well-settled that

> "An applicant rarely has been required to demonstrate a likelihood of success, irreparable injury, and that the equities favored preliminary relief as those terms are traditionally understood. Indeed, the courts have not professed to require such evidence (see **Ameurasia Int. Corp. v Finch Realty Co.**, 90 AD2d 760; **Finley v Park Ten Assoc.**, 83 AD2d 537; **Podolsky v Hoffman**, 82 AD2d 763). The threat of termination of the lease and forfeiture, standing alone, has been sufficient to permit maintenance of the status quo by injunction".

(**Post v 120 East End Ave. Corp.**, 62 NY2d 19, 25-26, 1984).

The plaintiff has demonstrated herein 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 an means short of vacating the premises. (**Long Is. Gynecological Servs. v 1103 Stewart Ave. Assocs. Ltd. Partnership**, 224 AD2d 591, 593; see **Empire State Bldg. Assocs. v Trump Empire State Partners**, 245 AD2d 225; **Stuart v D & D Assocs.**, 160 AD2d 547). — "

[* 8]

(**Purdue Pharma, LP v Ardsley Partners, LP**, 5 AD3d 654, 774 NYS2d 540, 2nd Dept., 2004). Accordingly, the court, to the extend set forth herein, **recalls** its order of August 23, 2007, entered on August 28, 2007, and **grants** the application for a Yellowstone injunction.

Accordingly the motion to reargue and/or renew the issue of a preliminary injunction is **denied**, and the Yellowstone injunction is **granted**.

A Preliminary Conference has been scheduled for November 30, 2007 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated OCT 29 2007

Stephen A Bucaria
J.S.C.

ENTERED

NOV 01 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE