Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

----------X

STRICTLY AUTO LEASING, INC.,

Plaintiff,

Index No.: 17540/07
Motion Date: 9/26/07
Motion Cal. No: 33
Motion Seq. No: 1

-against-

JANUSCZ CHETNIK,

Defendant.

----------X

The following papers numbered 1 to 15 read on this order to show cause by plaintiff for an order: (1) staying and tolling the expiration of the curative period set forth in the Notice to Cure dated June 30, 2007, from the defendant Januscz Chetnik to the plaintiff Strictly Auto Leasing Inc.; and (2) granting a temporary, preliminary and permanent injunction enjoining and restraining the defendant Januscz Chetnik and his agents and attorneys in any manner or by any means from taking any action to terminate the lease dated September 15, 2006, between plaintiff and defendant, and/or interfering with plaintiff's tenancy and possession of the premises by reason of any and all of the alleged defaults set forth in the Notice; and on this cross motion for an order dismissing the complaint, awarding damages to defendant on his counterclaim or, in the alternative, setting a hearing date on the applicability of the unclean hands doctrine and bad faith acts of plaintiff.

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Exhibits.....	1 - 5
Notice of Cross Motion-Affidavits-Exhibits-Verified Answer.....	6 - 10
Affirmations in Opposition to Cross-Motion.....	11 - 13
Reply Affirmation to Opposition to Cross-Motion- Exhibits.....	14 - 15

Upon the foregoing papers, it is ordered that the motion and cross motion are disposed of as follows:

Plaintiff Strictly Auto Leasing Inc. ("Strictly Auto") is a commercial tenant with a leasehold interest in premises owned by defendant Januscz Chetnik ("defendant"), pursuant to a lease executed by the parties on September 15, 2006, for premises located at 42-43 27th Street, Long Island City, New York. Strictly Auto commenced this action for declaratory and injunctive relief, and moves for a Yellowstone Injunction staying and tolling the expiration of the curative period set forth in the

Notice to Cure dated June 30, 2007, from defendant to Strictly Auto Leasing Inc., and granting a temporary, preliminary and permanent injunction enjoining and restraining defendant and his agents and attorneys in any manner or by any means from taking any action to terminate the lease dated September 15, 2006, between plaintiff and defendant and/or interfering with plaintiff's tenancy and possession of the premises by reason of any and all of the alleged defaults set forth in the Notice. Defendant cross moves for an order dismissing the complaint, awarding damages to defendant on his counterclaim or, in the alternative, setting a hearing date on the applicability of the unclean hands doctrine and bad faith acts of plaintiff.

Relevant Facts

On September 15, 2006, the parties entered into a five-year Lease Agreement, to commence on October 12, 2006 and to end November 30, 2011, pursuant to which Strictly Auto leased from defendant a one-story structure to be used as "a new car showroom and for auto sales and auto leasing." Beginning in November 2006, Strictly Auto engaged in demolition and construction to renovate the property to suit its needs at a cost of $250,000.00. Michael Silverstein, the President of Strictly Auto, alleges that, after renovation, the one-story structure has been converted to a new show room for sales and auto leasing, but only after presenting defendant with a set of plans to show the work intended to be done. He further alleges that defendant, whose personal residence is across the street from the commercial property:

> was present nearly every day having discussions with my contractor about the work that was being performed. He participated in observing all work that was performed and had comments on various aspects of the work. He was well aware and continued to oversee work performed on the subject premises for the entire period of the construction which lasted from November 2006 to the beginning of April 2007.

By letter dated March 20, 2007, defendant, by his attorney wrote:

> Please be advised that our client has indicated that he discussed renovating the second floor area of the building and constructing a staircase to access the second floor expansion. This matter was discussed at the time of the execution of the lease agreement and, although that understanding was not reduced to writing, both parties mutually agreed and consented that the landlord reserved part of the floor space on the first floor to accommodate a staircase access to the second floor. The landlord does not expect you to pay for the lost space that you claim will result in the event the staircase reduces the square footage you now lease. The landlord is willing to adjust the rent to allow for a fair abatement, per square foot lost, which will result if and when the staircase is constructed.

> Also, although the landlord has no present complaints with respect to any work you have done to the demised premises, he would appreciate any additional or future work to the demised premises be consented to in writing, as per the lease agreement.

Although a meeting was held thereafter to discuss the second floor addition, no further action was taken until the service of the Notice to Cure several months later. Mr. Silverstein opines that defendant now wants to sell the building.

Defendant, while conceding that he discussed the building modifications with Strictly Auto and met with its architect in October 2006, alleges that he reiterated that he intended to "build a small apartment above the commercial space because [he] intended to sell [his] residence across the street and move into the small apartment above the demised premises." He further alleges that "[a]lthough I repeatedly requested the tenant to give me a copy of his building plans for my review, he refused to give me a copy of such plans. I wanted to review his design to make sure that he incorporated my plans to build the second story apartment." He further alleges that in late November 2006, he "noticed that the tenant was commencing demolition work at the demised premises," but was denied access to inspect; that in mid-February, upon return from a month long vacation, he "noticed that the tenant had already started construction work;" and that after "repeated efforts to resolve the matter with the tenant and further assurances from the tenant that he would allow me to gain access to the second floor by utilizing a small 4' x 12' area of the first floor necessary to construct a staircase to the proposed second floor apartment, the tenant still failed to give me a copy of the building plans. Defendant concluded that "the tenant knew that I would not approve his plans without incorporating my proposed apartment into those plans. To avoid this issue, the tenant simply misrepresented himself as the owner and had his architect submit those fraudulent documents to obtain the building permits," and "to avoid the lease agreement requirement of obtaining the landlord's written consent and approval before applying for a building permit."

By Notice to Cure dated June 30, 2007, defendant asserted that Strictly Auto had breached paragraph 3 of the Lease Agreement by making substantial alterations to the premises without the defendant landlord's written consent, and paragraph 19 of the Rider of the Lease Agreement by submitting fraudulent documents to New York City Building Department to obtain building permits for the unauthorized work. On July 13, 2007, Strictly Auto, by order to show cause, filed the instant request for a Yellowstone injunction, and commenced the instant action for declaratory and injunctive relief.

Discussion

"A Yellowstone injunction maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant

may cure the default and avoid a forfeiture." Graybeard Molls Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates, 93 N.Y.2d 508, 514 (1999); Purdue Pharma, LP v. Ardsley Partners, LP, 5 A.D.3d 654 (2004); Gihon, LLC v. 501 Second Street, LLC, 306 A.D.2d 376 (2nd Dept. 2003). A Yellowstone injunction is designed to "forestall the cancellation of a lease to afford the tenant an opportunity to obtain a judicial determination of its breach, the measures necessary to cure it, and those required to bring the tenant in future compliance with the terms of the lease [see, Waldbaum, Inc. v. Fifth Ave. of Long Is. Realty Assocs., 85 N.Y.2d 600, 606, 627 N.Y.S.2d 298, 650 N.E.2d 1299 (1995)]." Marathon Outdoor, LLC. v. Patent Const. Systems Div. of Harsco Corp., 306 A.D.2d 254 (2nd Dept. 2003). The stay invoked by that injunction triggers the tolling of the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid the forfeiture of its investment in the leasehold is the very underpinning of the Yellowstone injunction. See, Graybeard Molls Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates, supra; Heon Lee v. TT & PP Main Street Realty Corp., 286 A.D.2d 665 (2nd Dept. 2001).

It is well settled that in order to obtain a Yellowstone injunction, the moving party must demonstrate that: (1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief 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. Graybeard Molls Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates, supra, 93 N.Y.2d 508, 514 (1999); Hempstead Video, Inc. v. 363 Rockaway Associates, LLP, 38 A.D.3d 838(2d Dept. 2007); Heon Lee v. TT & PP Main Street Realty Corp., 286 A.D.2d 665 (2d Dept. 2001); Mayfair Super Markets, Inc. v. Serota, 262 A.D.2d 461 (2d Dept. 1999).

Three of the prerequisites for the grant of an injunction have been met. Satisfying the fourth prong, however, is stymied by the lack of specificity of the Notice to Cure. "'The purpose of a notice to cure is to specifically apprise the tenant of claimed defaults in its obligations under the lease and of the forfeiture and termination of the lease if the claimed default is not cured within a set period of time.'" ShopRite Supermarkets, Inc. v. Yonkers Plaza Shopping, LLC, 29 A.D.3d 564 (2nd Dept. 2006), citing, Filmtrucks, Inc. v. Express Indus. & Term. Corp., 127 A.D.2d 509, 510 (1st Dept. 1987). Here, the notice to cure is insufficient to apprise plaintiff of what steps that would be required to be taken to cure the alleged violations. In no way are the "substantial alterations" described. Moreover, where, as here, there are factual disputes as to what transpired concerning the renovation as to defendant's "second floor apartment," as well as a colorable claim that defendant's March 2007 letter is a written acknowledgment of permission for the renovations completed to that date, injunctive relief can properly be granted. See, Melvin v. Union College, 195 A.D.2d 447 (2nd Dept. 1993)["the existence of a factual dispute will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance"] ; Mr. Natural, Inc. v. Unadulterated Food Products, Inc., 152 A.D.2d 729 (2nd Dept. 1989)["the existence of a factual dispute will not bar the granting of a preliminary injunction if one is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance."].

Conclusion

Based upon the foregoing, Strictly Auto's motion for a Yellowstone Injunction is granted, and defendant is hereby enjoined from terminating or cancelling the plaintiff's leasehold interest for the reasons stated in the notice to cure described above until such time as the declaratory judgment action filed by the plaintiff in conjunction with this motion is fully decided.

The foregoing is conditioned on plaintiff filing an undertaking in accordance with CPLR 6312. The standard to be applied in determining the undertaking is an amount that is rationally related to the damages the non-moving party might suffer if the court later determines that the relief should not have been granted. See, Ying Fung Moy v. Hohi Umeki, 10 A.D.3d 604 (2nd Dept. 2004); Lelekakis v. Kamamis, 303 A.D.2d 380 (2nd Dept. 2003); Schwartz v. Gruber, 261 A.D.2d 526 (2nd Dept. 1999). As a general rule, however, the amount is fixed by the court after a hearing held for such purpose. See, Cohn v. White Oak Coop. Hous. Corp., 243 A.D.2d 440 (2nd Dept. 1997); Peron Rest. v. Young & Rubicam, Inc., 179 A.D.2d 469 (1992); Times Sq. Stores Corp. v Bernice Realty Co., 107 A.D.2d 677 (2nd Dept. 1985). Accordingly, the parties are directed to appear before this Court on Wednesday, December 19, 2007, at 10:30 a.m., for a hearing on the fixing of the amount of the undertaking. Copies of this order are being sent to counsel for the parties by facsimile.

Dated: November 15, 2007

.....
J.S.C.