

**Kesselman Trimmings, Inc. v 240 W. 37 LLC**

2007 NY Slip Op 33929(U)

December 4, 2007

Supreme Court, New York County

Docket Number: 0112108/2007

Judge: Carol R. Edmead

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

PRESENT: CAROL EDMEAD  
J.S.C.  
Justice

PART 85

Kesselman Trimming, Inc.

INDEX NO. 112108107  
~~112109107~~

MOTION DATE 10/23/07

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

- v -  
240 West 37th LLC et al

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 \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

PAPERS NUMBERED

**UNFILED JUDGMENT**  
Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 11B)

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

The within motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that defendant's motion for summary judgment dismissing the complaint; rescinding the *Yellowstone* Injunction and terminating the lease *nunc pro tunc* is granted to the extent of dismissing the third and fifth cause of action; dismissing the action as against 240 West 37th Street Management, Inc., without opposition and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment for a declaration that it has cured the alleged defaults in the August 30, 2007 notice to cure and for a permanent injunction enjoining the new landlord from terminating the lease on any grounds alleged in the August 30, 2007 notice to cure is granted; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

This decision constitutes the order and judgment of the court.

Dated: 12/4/07

[Signature]  
CAROL EDMEAD J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK IAS PART 53

-----X

KESSELMAN TRIMMINGS, INC.,

Plaintiff,

v.

240 WEST 37 LLC, and 240 WEST 37<sup>TH</sup> STREET  
MANAGEMENT, INC.

Defendants.

-----X

EDMEAD, CAROL, J.S.C.

ORDER and JUDGMENT

Index. No. 112109/07

112108/07

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11B)

In this commercial landlord tenant dispute, defendants 240 West 37<sup>th</sup> LLC, the new owner of a commercial building located at that address in New York City (the "new landlord"), and 240 West 37<sup>th</sup> Street Management, Inc., the managing agent for the building, move to dismiss the complaint; to rescind the *Yellowstone*<sup>1</sup> Injunction and to terminate the lease, *nunc pro tunc*. Defendants also seek attorneys' fees. Plaintiff, Kesselman Trimmings, Inc. ("Kesselman") cross moves for a declaration that it has cured the defaults alleged in defendant's August 30, 2007 notice to cure ("notice to cure") and for an order enjoining defendants from terminating Kesselman's lease on any grounds alleged in the notice to cure. By telephone conference on November 20, 2007 and order dated November 21, 2007, the court notified the parties that, pursuant to CPLR 3211(c), it would convert the motion to dismiss and the cross motion for a declaratory judgment to a motion and a cross motion for summary judgment. Although the court invited the parties to submit additional evidence, they elected to proceed on the record that is

<sup>1</sup> *National Stores v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630 (1968)

currently before the court.

### BACKGROUND

Kesselman, a business that manufactures decorative trim for women's clothing, has, since October, 2000, rented the 6<sup>th</sup> floor in defendants' building located at 240 West 37<sup>th</sup> Street in Manhattan. Kesselman alleges that, since the new landlord acquired the building in July 2007, the new landlord has engaged in a campaign to remove the current commercial tenants in order to convert the building to luxury housing. On August 9, 2007, the new landlord served Kesselman with a 5 day "notice to cure" ("the first notice") that alleged that Kesselman failed to provide the new landlord with an insurance certificate that (1) named the new landlord as an additional insured; (2) that contained the required insurance limits and (3) that gave the new landlord 30 days notice of cancellation. In order to cure the alleged deficiencies in the first notice, Kesselman hired a new insurance broker who agreed to provide the landlord with the insurance certificate it demanded.

However, despite Kesselman's efforts to cure the alleged insurance problems, on August 30, 2007, the new landlord served Kesselman with, what appears to be, a superceding "notice to cure" based on the same alleged insurance deficiencies and a new alleged default, that states:

[I]n violation of Paragraph 11 [of the lease] and Rules and Regulation [sic] paragraph 4, You have allowed the names of Lois Passamentry Co., Inc. and Rosenfeld Novelties, Inc. to appear on the outside doorways of the demised premises and you have sublet part of the demised premises to Passamentry Co., Inc. and Rosenfeld Novelties, Inc.<sup>2</sup>

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<sup>2</sup> Paragraph 4 of the Rules and Regulations states, in pertinent part, "Only the Tenant named in the lease shall be entitled to appear on the Directory Board or Tablet. Additional names may be added at the Landlord's sole discretion under such terms and conditions as he may approve."

Paragraph 11 of the lease states, in pertinent part, "Tenant . . . expressly covenants that it

The August 30 notice also provides that in order to comply with the notice to cure, and correct the lease violations described above, you must, “remove said illegal occupant and remove the signs on the outside of the premises and the directory billboard . . . .” (Kessleman Aff., Ex. D) and provide an insurance certificate with the proper limits, that names the new landlord as an additional insured and that provides the new landlord with 30 days notice of cancellation if Kesselman defaults in paying the policy premiums

Immediately after receipt of the August 30, notice to cure, Kesselman commenced this action seeking a Yellowstone injunction; a permanent injunction; a declaration that it has not violated the lease and damages based on Kesselman’s allegations that the new landlord has purposely shut down elevator service during the course of the business day as, “a retaliatory maneuver designed to inconvenience tenants and force them to vacate the Building.” (Complaint, para. 16)

On September 11, 2007, the parties appeared before the court on Kesselman’s application for a Yellowstone Injunction. Prior to the hearing, Kessleman had taken the position that in 2000, it had acquired the assets of Lois Passementry, Inc. (“Passementry”) and that Passementry was not subletting any part of the 6<sup>th</sup> floor from Kesselman. Kesselman also stated that Passementry’s name appeared on the building directory with the knowledge and approval of the prior landlord. At the hearing, Kesselman once again denied that Passementry was subletting any portion of the space (9/11/07 Tr., p. 4, ll. 1-7)(Kesselman Aff., Ex. F), but, in an effort to demonstrate to the court that Kesselman was willing and able to cure any alleged defaults, it: 1) requested that the landlord remove all signs referring to Passementry; 2) submitted invoices to

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shall not assign . . . nor underlet or suffer or permit the demised premises or any part thereof to be used by others, without the prior written consent of the owner in each instance.”

Neither party has addressed the notice as to Rosenfeld Novelties, Inc.

demonstrate that all of Passementry's manufacturing, sales and invoicing are done through Kesselman; 3) agreed to take any and all steps the court directed to remove the indicia that Passementry was using the demised premises including dissolving Passementry and disconnecting Passementry's phone line and 4) Kesselman assured the court that it was able to procure insurance that complied with the landlord's demand.

After hearing the testimony of Alan Michaels, Passementry's former CEO, the court stated, "Initially at least . . . on the face of it, it looks like . . . Passementry is using the space, and then the question is . . . what you have to do in order to cure, to eliminate the corporation of Lois Passementry using the space." (9/11/07 Tr., p. 26, l. 26; p. 27, ll. 3-8) Based on the evidence, the court found that the alleged defaults under the lease were curable and granted Kesselman's application for a *Yellowstone* Injunction. (9/11/07 Tr., p. 28) The court further stated, "the only way [Kesselman] could prevail is to cure and eliminate the indicia of use. And if [Kesselman is] not able to do that when we come back, the stay will be lifted." (Tr. p. 27, ll. 21-24)

### CONTENTIONS

In support of the motion for summary judgment to dismiss the complaint; dissolve the *Yellowstone* injunction and terminate the lease, defendants argue that the testimony of Alan Michaels establishes that Passementry was, at all relevant times, a distinct legal entity with its own phone number and employee and that Passementry occupied or sublet part of the premises leased to Kesselman which constitutes an incurable default under the lease (*Excel Graphics Technologies, Inc. V. CFG/AGSCB 75 Ninth Avenue, L.L.C.*, 1 A.D. 3d 65 [1<sup>st</sup> Dept 2003]) Defendants also contend that although the insurance certificate, on its face, appears to comply with the landlord's request, it has demanded that Kesselman produce a complete copy of the insurance policy to determine whether Kesselman has included large exclusions in the policy that

are not permitted under the lease.

Regarding the elevators, the landlord argues that it has a right under the lease to shut down the elevators for necessary repairs, alterations and improvements; that the third cause of action for a mandatory injunction must be dismissed because Kesselman has an adequate remedy at law and that the fifth cause of action alleging harassment must be dismissed because New York does not recognize a civil cause of action for harassment.

In opposition to the motion to dismiss the complaint pursuant to CPLR 3212 and in support of the cross motion for a declaratory judgment and a permanent injunction, Kesselman argues that the landlord's motion to rescind the *Yellowstone* injunction is an impermissible collateral attack on this court's September 11, 2007 decision; that the evidence establishes that Kesselman did not illegally sublet the premises to Passementry and that the evidence also establishes that it has cured any alleged defaults under the lease. Moreover, Kesselman argues that the lease requires the landlord to maintain both passenger and freight elevator service and that the evidence demonstrates that the landlord has failed to provide the required elevator service and/or to perform necessary repairs and alterations with minimum disruption to the tenants.

## **DISCUSSION**

### **Summary Judgment**

On a motion for summary judgment, the proponent of the motion must make a *prima facie* showing of entitlement to judgment as a matter of law by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact. (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; *Zuckerman v. City of New York*, 49 N.Y.2d 557,562 [1980]) The motion must be supported by "affidavit [from a person having

knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions.” (CPLR 3212[b])

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require trial of any issue of fact (CPLR 3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for the failure to do so. (*Vermette v. Kenworth Truck Co.*, 68 N.Y.2d 714 (1986); *Zuckerman v. City of New York*, *supra* at 560)

The new landlord’s motion for summary judgment dismissing the complaint, dissolving the Yellowstone injunction and terminating the lease *nunc pro tunc* is granted to the extent of dismissing the third cause of action for a mandatory injunction and the fifth cause of action for harassment. In addition, the complaint is dismissed as against 240 West 37<sup>th</sup> Street Management, Inc, without opposition. The motion is otherwise denied. Kesselman’s cross motion for summary judgment for a declaration that it has cured the alleged defaults in the August 30, 2007 notice to cure and for a permanent injunction enjoining the new landlord from terminating the lease on any grounds alleged in the August 30, 2007 notice to cure is granted.

#### A. Insurance

Here, Kesselman has made a *prima facie* showing that it is entitled to judgment by submitting a copy of an Insurance Certificate establishing that it has cured the alleged insurance violation by procuring an insurance policy with the liability limits required by the lease; that names the new landlord as an additional insured and that gives the new landlord 30 days prior notice of any cancellation resulting from Kesselman’s non-payment of premiums (Kesselman Aff, Ex. G). Thus, Kesselman has fully complied with the decretal paragraphs in the notice to

cure regarding the steps it must take to cure the alleged violations regarding insurance.

The new landlord's assertion that the policy may contain large exclusions that are not permitted by the lease (Ayers Aff., para. 12) is insufficient to raise a question of fact regarding the insurance because the August 30 notice to cure did not include "policy exclusions" in its list of defaults or demand that Kesselman cure any alleged violation regarding such exclusions.

#### B. Illegal Use

Kesselman has established a prima facie case that it is entitled to judgment in its favor by submitting evidence that demonstrates that Passementry has been dissolved, that Passementry's telephone has been disconnected (Kesselman Aff, Ex. H) and that Kesselman has requested that the new landlord remove Passementry's name from the company directory and that all other Passementry signs have been removed. (9/11/07 Tr., p. 2, ll. 7-26, p. 3, l. 2). Accordingly, Kesselman has done all that was required in the August 30 notice in order to cure the alleged violation of Paragraph 11 of the lease and Paragraph 4 of the Rules and Regulations. Moreover, the new landlord has failed to come forward with a scintilla of evidence to show that Passementry was actually subletting the premises as alleged in the notice or that Kesselman has failed to extinguish all indicia of Passementry's use of the space. (*See, e.g. Bank of Nova Scotia v. Cartright & Goodwin, Inc.*, 160 Misc. 2d 856 [N.Y. City Civ. Ct. 1994][no rent checks to landlord from alleged sublessee]).<sup>3</sup>

The new landlord's reliance on *Excel Graphics Technologies v. CFG/AGSCB 75 Ninth Avenue*, 1 A.D.3d 65 (1<sup>st</sup> Dept 2003) for the proposition that the alleged sublet is incurable, is

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<sup>3</sup> As quoted above, the lease states that permitting others to "use" the premises and "underletting" the premises are different violations of the lease (Kesselman Aff., Ex. A, para. 11) and the August 30, notice to cure alleges only that Kesselman has illegally sublet the space, it does not complain about Passementry's use of the space.

without merit. In *Excel*, the court denied *Yellowstone* relief finding that the tenant's default was not curable where the tenant admitted violating the lease by subletting the premises to eight different entities and profiting from the illegal tenancies. Moreover, in *Excel* the lease contained a non-waiver clause that unambiguously and unequivocally negated the tenants claim that the landlord had waived the "illegal sublet" lease violation. Here in contrast, Kesselman maintains that it did not sublet the premises and there is no evidence that the premises were, in fact, sublet. All that is apparent is that Passementry was, at most, "using" the premises and, as the court directed, that Kesselman has cured any alleged illegal use. Moreover, the court notes that the new landlord's argument that the alleged breach is incurable cannot be reconciled with its August 30 notice to cure that specifically gave Kesselman an opportunity to cure. (*See, Savoy Management Corp. v. 151 William Realty, LLC*, 8/17/05 N.Y.L.J. 18, col. 1 (Sup. Ct., N.Y. County))

### C. Elevators

As to the elevator service, paragraph 31 of the lease requires the new landlord to provide passenger elevator service, on business days from 8 a.m. to 6 p.m.; on Saturdays from 8 a.m. to 1 p.m. and freight elevator service on business days. The lease further states,

Owner reserves the right to stop service of the . . . elevator. . . when necessary, by reason of accident or emergency, or for repairs, alterations, replacements or improvements, in the judgment of the owner desirable or necessary to be made, until said repairs, alterations, replacements or improvements shall have been completed.

In support of the motion to dismiss the causes of action demanding damages for business interruption (4<sup>th</sup> cause of action) and breach of contract to provide elevator service (6<sup>th</sup> and 7<sup>th</sup>

causes of action), the new landlord submits an affidavit and repair records from Luna Elevator Service that show that at least one, and sometimes two, of the building's elevators were out of service for maintenance or repairs, for at least part of the day on August 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 14<sup>th</sup>, 23<sup>rd</sup> and 30<sup>th</sup> and September 10<sup>th</sup>.

In opposition, Kesselman submits letters and e-mails from customers of another tenant in the same building who were unable to access that tenant's offices on August 7<sup>th</sup> and 8<sup>th</sup> and September 3 because there was no elevator service available. In addition, Kesselman alleges that the new landlord has disrupted elevator service on a daily basis, in bad faith, by ordering the elevator disruptions, not for the purpose of maintenance or repair, but to harass and inconvenience the tenants. (10/17/07 Kesselman Aff, para. 46)

Here, the evidence, coupled with Kesselman's allegations of the landlord's bad faith, create a question of fact as to whether the landlord's actions unjustly deprived Kesselman of elevator services that were essential to its business operations and that Kesselman was entitled to under the lease. (*See, Union City Suit Co., Ltd. V. Miller*, 162 A.D.2d 101 [1<sup>st</sup> Dept 1990])[despite the exculpatory clause in the lease, it is evident that plaintiff did not agree in the lease to an extended and unreasonable interruption of essential services resulting in harm to its business]; N.Y Prac, Landlord Tenant Practice in New York, Section 10.59 ["The tenant may state a viable breach of contract claim when the landlord's deprivation of essential services required by the lease interferes with the tenant's use of the demised premises."])

However, the third cause of action for a mandatory injunction regarding the elevators is dismissed as Kesselman has an adequate remedy at law. (*See, Sokoloff v. Harriman Estates*, 96 N.Y.2d 409 [2001]) The fifth cause of action alleging harassment is also dismissed because New

York does not recognize a civil cause of action for harassment. (*See, Jacobs v. 20 East 36<sup>th</sup> Owner Corp.*, 281 A.D.2d 281 [1<sup>st</sup> Dept 2001])'

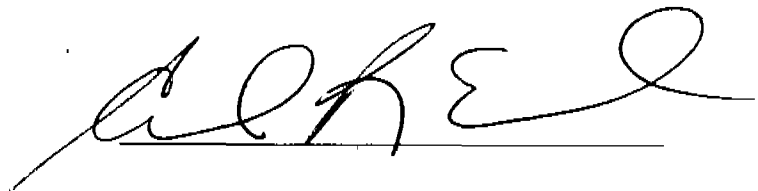
Accordingly, it is ORDERED that defendant's motion for summary judgment dismissing the complaint; rescinding the *Yellowstone* Injunction and terminating the lease *nunc pro tunc* is granted to the extent of dismissing the third and fifth cause of action; dismissing the action as against 240 West 37<sup>th</sup> Street Management, Inc., without opposition and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment for a declaration that it has cured the alleged defaults in the August 30, 2007 notice to cure and for a permanent injunction enjoining the new landlord from terminating the lease on any grounds alleged in the August 30, 2007 notice to cure is granted; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

This decision constitutes the order and judgment of the court.

DATE 12/4/07



J.S.C.  
**CAROL EDMED**  
J.S.C.

**UNFILED JUDGMENT**  
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