

**Soho Elec., Inc. v Petbar Realty Co. Inc.**

2008 NY Slip Op 30267(U)

January 22, 2008

Supreme Court, New York County

Docket Number: 0110748/2007

Judge: Doris Ling-Cohan

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

PRESENT: \_\_\_\_\_  
Justice

PART 36

Soho Electric Inc.

INDEX NO. 110748/07

Petbar Realty Co., Inc.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001-002

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion <sup>s</sup> to/for Yellowstone injunction + continued stay

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1, 2, <del>3, 4, 5, 6, 7, 8</del>	
3	<del>17</del> 5 9
4	<del>8</del> 6 <del>12</del>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that ~~this motion~~ these motions for a yellowstone injunction + continued stay are consolidated for disposition & decided in accordance with the attached memorandum decision.

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

**FILED**  
JAN 5 1 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

JAN 22 2008

Dated: ~~1/22/08~~ 1/22/08

HON. DORIS LING-COHAN  
[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

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

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

-----X  
SOHO ELECTRIC, INC,

Index: 110748/2007

Plaintiff,

Motion Seq. 001 &  
002

-against-

PETBAR RLTY. CO. INC.,

Defendant.

**FILED**  
JAN 31 2008  
NEW YORK COUNTY CLERK'S OFFICE

DECISION/  
ORDER

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Plaintiff, a commercial tenant of defendant landlord, has moved for an order to show cause for a *Yellowstone* injunction, pursuant to *First National Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 NY2d 630 (1968). Specifically, as indicated in the order to show cause, plaintiff seeks an order striking and/or staying, tolling and suspending: (1) the Notice to Cure dated July 18, 2007 ("Notice to Cure"); (2) the Notice of Termination dated August 1, 2007 ("First Notice of Termination"); and (3) the Notice of Termination dated August 2, 2007 ("Second Notice of Termination"), in order to permit plaintiff to preserve its right to litigate the issues herein raised and to cure any violations of its lease which may be found by the Court. Plaintiff further seeks an order enjoining and restraining defendant from taking any steps to terminate plaintiff's tenancy, or to remove plaintiff from, or interfere with plaintiff's possession/occupancy of the subject premises.

In opposition, defendant argues that there is no basis for the granting of a *Yellowstone* injunction, since, according to the parties' lease, there is no cure period for plaintiff's alleged default. According to defendant, the notice to terminate, dated August 2, 2007, was issued due to plaintiff's monetary default, and pursuant to paragraph 67 of the lease, defendant is not obligated to first serve a notice to cure or offer an opportunity to cure such default.

To obtain a *Yellowstone* injunction, the tenant-movant must show that: (1) it holds a commercial lease; (2) the landlord served upon tenant-movant a notice to cure or notice of defect, or that it faces threat of lease termination; (3) it sought injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means

other than vacating the subject premises. *Lexington Ave. & 42<sup>nd</sup> St. Corp. v. 380 Lexchamp Operating, Inc.*, 205 AD2d 421, 423 (1<sup>st</sup> Dept 1994); *see also 225 E. 36<sup>th</sup> St. Garage Corp. v. 221 E. 36<sup>th</sup> Owners Corp.*, 211 AD2d 420 (1<sup>st</sup> Dept 1995).

“The purpose of a *Yellowstone* injunction is to maintain the status quo so that the tenant may challenge the landlord’s assessment of its rights without the tenant, during the pendency of the action, forfeiting its valuable property interest in the lease...As such, it may be granted on less than the normal showing required for preliminary injunctive relief...”.

*Lexington Ave. & 42<sup>nd</sup> St. Corp. v. 380 Lexchamp Operating, Inc.*, 205 AD2d at 423; *see also Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc.*, 93 NY2d 508 (1999); *Garland v. Titan West Associates*, 147 AD2d 304 (1<sup>st</sup> Dept 1989).

Here, plaintiff has failed to establish such criteria to warrant the granting of a *Yellowstone* injunction. Specifically, with respect to the Notice to Cure referenced by plaintiff dated July 18, 2007 (Exh. 1, Order to Show Cause), plaintiff failed to demonstrate that it timely requested injunctive relief prior to the effective termination date, as such Notice to Cure provides for a termination date of July 25, 2007, and the within order to show cause was not filed until on or about August 6, 2007.

With respect to the First Notice of Termination and the Second Notice of Termination referenced above, since they are based upon plaintiff’s alleged failure to timely pay rent pursuant to paragraph 67 of the lease, *should plaintiff’s alleged default of be established*, the lease would terminate, without affording plaintiff an opportunity to cure.

Paragraph 67 of the lease provides, in relevant part, as follows:

“(a) whenever Tenant shall fail to pay any item of Base Rent and/or Additional Rent when said Base Rent or Additional Rent is due and payable...Landlord may give Tenant a notice of intention to end the term of this Lease at the expiration of five (5) days from the date of the service of such notice of intention, and upon the expiration of said five (5) days this Lease...shall terminate...”.

Where, there is no right to cure, or where the cure period has ended prior to the seeking of a

Yellowstone injunction, the motion for a Yellowstone injunction must be denied. See *403 W. 43 Street Rest. Inc. v. Ninth Ave. Rlty., LLC*, 36 AD3d 464 (1<sup>st</sup> Dept 2007); *Gyncor, Inc. v. Ironwood Rlty. Corp.*, 259 AD2d 363 (1<sup>st</sup> Dept 1999); *Wuertz v Cowne*, 65 AD2d 528 (1<sup>st</sup> Dept 1978). As the lease negotiated between the parties fails to provide a cure period where there is a failure to timely pay rent, plaintiff's motion for a *Yellowstone* injunction must be denied.

The Court notes that in seeking a Yellowstone injunction, movant has not argued in the alternative that it is entitled to a preliminary injunction pursuant to CPLR §6301, and has not asserted grounds in support of such relief. To be entitled to a preliminary injunction, the plaintiff must clearly demonstrate: (1) a likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities in their favor. See *Nobu Next Door v. Fine Arts Housing*, 4 NY3d 839, 840 (2005); *Aetna Ins. Co. v Capasso*, 75 NY2d 860 (1990); *Borenstein v Rochel Props., Ins.*, 176 AD2d 171, 172 (1<sup>st</sup> Dept 1991); this was not done in the papers before the Court.

Further, the Court notes that, in denying plaintiff's request for a Yellowstone injunction, it has *not* ruled with respect to the validity or sufficiency of the *many* notices served by defendant, as to whether such notices were properly served, whether the notices will provide a proper predicate for the commencement of a summary proceeding, whether plaintiff is in fact in default of the lease. Plaintiff may assert all of its relevant arguments in the context of a summary proceeding in the Civil Court, should defendant landlord pursue such remedy. Moreover, although plaintiff seeks that this Court "strike" the three (3) notices which are the subject of this motion, plaintiff failed to cite to case law which would support the granting of such ultimate relief, in conjunction with this application for a *Yellowstone* injunction.

The Court notes that defendant landlord is free to use the remedies available to it in landlord-tenant court and this litigation does not bar the use of such forum, which is better suited to resolving such disputes. See *Handwerker v. Ensley*, 261 AD2d 190 (1<sup>st</sup> Dept 1999); *Post v. 120 East End Ave.*, 62 NY2d 19 (1984); *Lun Far Co. Inc. v. Aylesbury Assoc.*, 40 AD2d 794 (1<sup>st</sup> Dept 1972); *Scheff v. 230 East 73<sup>rd</sup> Owners Corp.*, 203 AD2d 151 (1<sup>st</sup> Dept 1994); *Waterside*

*Plaza, LLC v. Yasinskaya*, 306 AD2d 138 (1<sup>st</sup> Dept 2003).

Based upon the above, it is

ORDERED that plaintiff's motion for a *Yellowstone* injunction is denied; it is further

ORDERED that plaintiff's motion (sequence number 002) seeking an order amending the order to show cause dated August 7, 2007 to the extent of extending the stay, is deemed moot; it is further


*ORDERED that all parties shall appear before this Court for a discovery compliance conference on Friday, February 1, 2008, at 10 o'clock a.m, Room 279, 80 Centre Street, as per this Court's preliminary conference order dated September 25, 2007;* and it is further

ORDERED that within twenty (20) days of entry of this decision/order, defendant shall serve a copy upon plaintiff with notice of entry.

This constitutes the decision and order of the Court.

Copies of this order shall be supplied to all parties by the Clerk of this Part.

Dated: January 22, 2008

  
\_\_\_\_\_  
Doris Ling-Cohan, JSC

Check One:  FINAL DISPOSITION       NON-FINAL DISPOSITION

Check if Appropriate:  DO NOT POST

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**FILED**  
JAN 31 2008  
NEW YORK  
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