

**JSM Capital Holding Corp. v Vandergrand  
Props. Co., L.P.**

2008 NY Slip Op 31135(U)

April 15, 2008

Supreme Court, New York County

Docket Number: 0115850/2007

Judge: Shirley W. Kornreich

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

PRESENT: KORNREICH  
Justice

PART 54

JSM CAPITAL HOLDINGS CORP

INDEX NO. 115858/07

MOTION DATE 1/10/08

MOTION SEQ. NO. 1

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

- v -

VANDERGLAND PROPERTIES

The following papers, numbered 1 to 3 were read on this motion to/for Yellowstone Injunction

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

PAPERS NUMBERED

1, 3

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

2

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

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, it is ordered that this motion

APR 18 2008

COUNTY CLERK'S OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

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

Dated: 4/15/08

HON. SHIRLEY WERNER KORNREICH  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
JSM CAPITAL HOLDING CORP.,

Plaintiff,

-against-

VANDERGRAND PROPERTIES CO., L.P.,

Defendant.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

Index No.: 115850/07

DECISION  
and ORDER

**FILED**

APR 18 2008

COUNTY CLERK'S OFFICE  
NEW YORK

This is an action seeking a declaratory judgment and a permanent injunction enjoining defendant from taking any steps to terminate plaintiff's lease based on a "Notice to Cure Default" issued on November 13, 2007. Plaintiff JSM Capital Holding Corp. (JSM) now moves, by Order to Show Cause, for a Yellowstone injunction, tolling the time to cure the alleged defaults, on the ground that it is has not defaulted under the lease. Defendant opposes and requests that, if the Court does grant plaintiff's motion, it: (1) fix an undertaking in the amount of \$832,590.00 for its future rent, calculated from the current market value of the leasehold; (2) order JSM to pay past due rent and real estate taxes for December 2007; and (3) order plaintiff to remain current in its rental payments.

*I. Background*

JSM is an independent brokerage firm formerly affiliated with a national broker dealer known as vFinance, Inc. (vfinance). Since 2004, JSM has been a tenant by assignment of the seventh floor of a building located at 880 Third Avenue, New York, New York 10022 (the Premises). JSM occupies the Premises in accordance with the terms outlined in the original lease

dated July 16, 1990 (the Lease). On or about September 14, 2004, JSM and landlord/defendant Vandergrand Properties Co., L.P. (Vandergrand) entered into a lease amendment extending the lease term through December 31, 2010.

In the summer of 2005, JSM's relationship with vFinance deteriorated. JSM subsequently defaulted in rent payments under the Lease and Vandergrand instituted eviction proceedings. At this time, due to its falling out with vFinance, JSM forged a new business relationship with national broker dealer Clark Dodge & Company, Inc. (Clark). JSM and Clark performed a "*de facto* merger" where JSM operated Clark's brokerage operations inside the Premises. JSM settled the non-payment proceedings brought against it in March 2006. As part of this settlement, Clark wrote two checks to Vandergrand totaling \$52,341.00.

On or about July 1, 2007, JSM and Clark executed a sublease where JSM agreed, *inter alia*, to sublet the entire Premises to Clark (the Clark Sublease). A portion of the Premises, however, was not being used. Consequently, on or about August 1, 2007, JSM entered into a sublease with Hollywall Entertainment, LLC (Hollywall), where it agreed to sublet approximately 45% of the Premises to Hollywall (the Hollywall Sublease). Both subleases were forwarded to Vandergrand's attorney for review. Also, in August 2007, Vandergrand once again instituted eviction proceedings in New York City Civil Court against JSM due to its default in making rental payments (the August Eviction Proceeding).

In a letter dated October 18, 2007 (the October Letter), Vandergrand's attorney acknowledged receipt of the subleases and noted that each sublease may have been executed in violation of Articles 11 and 58 of Lease. Article 's 11 and 58 provide:

Assignment, Mortgage, etc: 11. Tenant, for itself, its heirs, distributes, executors,

administrators, legal representatives, successors and assigns, expressly covenants that it shall not assign, mortgage or encumber this agreement, nor underlet, or suffer or permit the demised premises or any part thereof to be used by others, without the prior written consent of Owner in each instance. Transfer of the majority of the stock of a corporate tenant shall be deemed an assignment. If the lease is assigned, or if the demised premises or any part thereof be underlet or occupied by anybody other than the Tenant, Owner may, after default by the Tenant, collect rent from the assignee, under-tenant or occupant, and apply the net amount collected to the rent herein reserved, but no such assignment, underletting, occupancy or collection shall be deemed a waiver of this covenant, or the acceptance of the assignee, under-tenant or occupant as tenant, or a release of Tenant from the further performance by tenant of covenants on the part of Tenant herein contained. The consent by Owner to an assignment or underletting shall not in any wise be construed to relieve Tenant from obtaining the express consent in writing of Owner to any further assignment or underletting. See Article 58.

58. Subletting a portion of the Demised Premises

In the event that Tenant shall desire to sublet the Demised Premises, or to permit the same to be occupied by any person other than Tenant, its officers or employees, Tenant shall submit, in writing, to Landlord the name of the proposed subtenant or occupant, the nature and character of its business, the terms and conditions of the proposed subletting, information as to the financial responsibility and standing of the proposed subtenant and such other information as Landlord may reasonably request. Simultaneously with such submission, Tenant shall also deliver to Landlord a written agreement fully executed and acknowledged by Tenant surrendering to landlord the portion of the Demised Premises proposed to be sublet or to be occupied by a person or firm other than Tenant...

Notwithstanding the recapture provisions set forth above, Tenant shall be permitted to sublease or permit occupancy of up to fifty (50%) percent of the Demised Premises without the necessity of complying with said recapture provision.

Regarding the Clark Sublease, the October Letter indicated that Vandergrand had not received any documentation from JSM as required under Article 58 of the Lease. Therefore, "the information and fully executed and acknowledged surrender agreement required by Article 58 of the Lease must be submitted to [Vandergrand] before [Vandergrand] can consider approving the [Clark Sublease]."

Regarding the Hollywall Sublease, the October Letter stated that since JSM had already agreed to sublet the entire Premises to Clark, it could not then enter into any subsequent sublease

without Clark's consent. Therefore, the Clark Sublease had to be modified to reflect this change. In addition, the Hollywall Sublease needed to comply to Article 58 and list Clark, not JSM, as the tenant/lessor. The October Letter closed by stating that JSM should immediately advise Vandergrand as to when it would be sending the required documentation, and that if it "did not immediately fulfill the requirements of Article 58 with respect to Clark and Hollywall, [Vandergrand] will declare a default in the Lease." The letter additionally noted that Vandergrand would be depositing an escrow check dated October 17, 2007 from Clark in the amount of \$75,000 towards JSM's account.

On November 1, 2007, Vandergrand, JSM, Clark, and Hollywall executed a stipulation of settlement regarding the August Eviction Proceeding. Pursuant to the stipulation, the parties agreed to a judgment against JSM for \$55,000. Vandergrand would stay execution of its warrant of eviction pending payment of a check from Hollywall in full satisfaction of the judgment. The stipulation also noted in paragraph six that "[Vandergrand] is accepting the Hollywall Check without prejudice to any and all rights it may have with respect to the unauthorized occupancy of Hollywall and Clark Dodge & Co. and nothing herein constitutes an acknowledgment or acceptance of any sub-tenancy or right of occupancy by [Hollywall or Clark]." JSM also reserved its rights as to any claims or defenses it might possess regarding Clark's and Hollywall's occupancy. Hollywall's check was subsequently cashed in satisfaction of the judgment.

On November 13, 2007, Vandergrand sent a "Notice to Cure Default" to JSM indicating that it's subleases to Clark and Hollywall were in violation of Articles 11 and 58 of the Lease, and that if JSM failed to cure its default on or before November 30, 2007, its tenancy would be terminated. Upon receipt of the Notice to Cure Default, JSM commenced this action, by Order to

Show Cause, on November 28, 2007. In reference to JSM's ability to cure the alleged defaults, its's president, John S. Matthews, avers that JSM has "been endeavoring to compile and furnish" the requested information so that it may be in compliance with Articles 11 and 58 of the Lease. Matthews further avers that it "is prepared to cure all defaults, including potentially cancelling the Clark Dodge Sublease and starting the process anew."

## II. *Conclusions of Law*

### A. *Yellowstone Injunction*

"The purpose of a Yellowstone injunction is to maintain the status quo so that a commercial tenant may protect its valuable property interest in the lease while challenging the landlord's assessment of its rights." *225 E. 36th St. Garage Corp. v. 221 E. 36th Owners Corp.*, 211 A.D.2d 420 (1<sup>st</sup> Dept. 1995) *citing Post v. 120 E. End Ave. Corp.*, 62 N.Y.2d 19 (1984). The remedy was developed as an alternative to the "all or nothing" nature of landlord-tenant disputes. *See Post*, 62 N.Y.2d at 25.

The requirements for granting a Yellowstone injunction are "far less than the normal showing required for preliminary injunctive relief." *Id.* However, the moving party must still 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 is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises. *Garage*, 211 A.D.2d at 421. In determining whether the proponent has the ability to cure, the Court is not limited to considering the proponent's financial or other resources, but may also consider whether the proponent has a genuine desire to cure the defect. *See id.* at 422 (plaintiffs' efforts to cure required desire and

ability to cure).

Here, JSM is not entitled to injunctive relief because it has not demonstrated the ability to cure the alleged defaults. Article 58 of the Lease states that if JSM desires to sublet it must submit various documentation to defendant for approval. JSM entered into two separate subleases without submitting any of the required documentation and without the required permission from Landlord. JSM first sublet the entire Premises to Clark. Then, it sublet 45% of Clark's Sublease to Hollywall, in direct violation of Articles 11 and 58 of the Lease.

In addition, JSM has not averred facts demonstrating it is willing and able to cure. JSM stated it merged with Clark. Article 11 of the Lease provides that "Transfer of a majority of the stock of a corporate tenant shall be deemed an assignment." Therefore, JSM's "*de facto*" merger with Clark acted as an assignment. Consequently, JSM's failure to get approval of this assignment violated Article 11 of the Lease. JSM cannot cure this defect. Cancellation the Clark Sublease will have no meaning and effect since the two companies are now one in the same. As a result, this unauthorized assignment results in an incurable default. *Zona, Inc. v. Soho Centrale, LLC*, 270A.D.2d 12 (1<sup>st</sup> Dept 2000) (application for Yellowstone injunction denied where tenant's assignment resulted in incurable default).

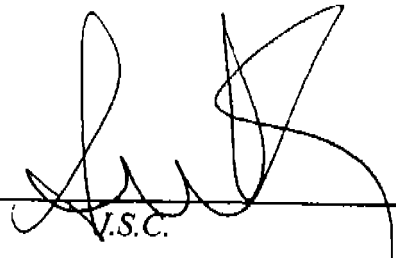
However, even were the cancellation of the sublease with Clark possible, the Yellowstone injunction would still be denied. In its pledge to cure, JSM did not state any willingness to cancel the Hollywall Sublease and remove Hollywall from the Premises. *Zona*, 270 A.D.2d at 14 (Yellowstone injunction denied where tenant failed to assert ability to cure default by undoing assignment of lease). Accordingly, it is

ORDERED that plaintiff's application for a Yellowstone injunction is denied; and it is

further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 15, 2008  
New York, New York

  
\_\_\_\_\_  
U.S.C.

**FILED**  
APR 18 2008  
COUNTY CLERK'S OFFICE  
NEW YORK