

Garuda Thai Corp. v Great Canal Realty Corp.
2008 NY Slip Op 31251(U)
April 12, 2008
Supreme Court, New York County
Docket Number: 0600724/2008
Judge: Richard B. Lowe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MICHAEL B. LOWE, III
Lowe
Justice

PART 56m

GARUDA Thai CORP

INDEX NO. 600724/08

MOTION DATE 3/19/08

MOTION SEQ. NO. 001

- v -

GREAT CANAL Realty Corp

MOTION CAL. NO. _____

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 _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

APR 22 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/17/08

HON. MICHAEL B. LOWE, III
[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

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

-----X
GARUDA THAI CORP.,

Plaintiff,

-against-

GREAT CANAL REALTY CORPORATION,

Defendant.

Index No. 600724/08

FILED

APR 22 2008

COUNTY CLERK'S OFFICE
NEW YORK

Hon. Richard B. Lowe, III:

Plaintiff moves for a "Yellowstone" injunction enjoining defendant Great Canal Realty Corporation from cancelling or terminating the lease agreement dated April 20, 2002 between the defendant as landlord and plaintiff as tenant.

Background

On April 20, 2002, the parties executed a lease for a ten year term commencing on May 1, 2002 and ending on April 30, 2012 (*Order to Show Cause*, Exhibit A) . The terms of the lease permit the use of the premises for a "martial arts center and/or health facility spa" (*Id*). The plaintiff runs a martial arts studio on the third floor of the premises.

On or about February 26, 2008, the defendant served plaintiff with a Notice to Cure by March 13, 2008 ("Notice"). The defendant alleges plaintiff is in default of paragraph 44 of the lease due to alleged vibrations emanating from plaintiffs martial arts studio which is causing damage to the building including ceiling leaks, cracked plaster and sheet rock in the walls and

ceiling of the commercial space on the second floor below.¹ Defendant also alleges there is incessant noise and vibrations consistently emanating from the premises which is disturbing other tenants.

In response, the Plaintiff asks this court for a Yellowstone injunction.

Discussion

“The purpose of a Yellowstone injunction is to stay the cure period before it expires so as to preserve the lease until the merits of the dispute can be resolved in court . . .” (*Reade v 405 Lexington, LLC*, 19 AD3d 179, 180 [1st Dept 2005]). The law does not favor forfeiture of leaseholds (*Herzfeld & Stern v Ironwood Rlty. Corp.* 102 AD2d 737, 738[1st Dept 1984]). Yellowstone injunctions “ have become commonplace, with courts granting them routinely to avoid forfeiture of the tenant’s substantial interest in the lease hold premises (*Graubard Mollen*

¹Paragraph 44 of the lease states:

(a) Tenant shall use and occupy the Premises as Martial Arts Center/Health Facility Spa. Tenant shall not use, occupy, suffer or permit the Premises, or any part thereof, to be used in any manner, or suffer or permit anything to be brought into or kept therein, that would, in Landlord’s judgment . . .(e) cause or be likely to cause injury or damage to the Building or any part thereof; (f) constitute a public or private nuisance; . . .(h) emit or discharge unusual, noxious or objectionable noise, fumes, vapors or odors into the Building, or that can be detected outside the Premises; (I) cause any vibration to the Premises and/or Building that would disturb other tenants in the Building or any other persons outside of the premises . . .(k) impair or inconvenience to, Landlord or any other tenant . . .

(B)(8) If at any time Landlord shall disapprove and matter(s) or practice(s) covered by this paragraph 44, Tenant shall reasonable remove the basis for such disapproval in such manner and with such time as many reasonably be specified by Landlord in a written notice by it to Tenant.

Horwitz Pomeranz & Shapiro v 600 Third Ave Associates, 93 NY2d 508, 693 [1999]).

A tenant is entitled to a Yellowstone injunction where it is demonstrated that the movant (1) holds a commercial lease; (2) has received a notice to cure from the landlord; (3) applied for a temporary restraining order prior to the termination of the cure period under the lease; and (4) has the desire and ability to cure the alleged default by any means short of vacating the premises (*See First Nat. Stores, Inc., v Yellowstone Shopping Center, Inc.*, 21 NY 2d 630 [1968]; *Stuart v D&D Associates*, 554 NYS2d 197 [1st Dept 1990]).

The parties agree the first three standards for a Yellowstone injunction have been met. The defendant, however, argues the plaintiff has failed to demonstrate its willingness to cure the alleged default.

A tenant need not prove that he/she can cure the alleged defects to obtain a Yellowstone injunction, however the court must be convinced of his/her desire and ability to cure the defects (*Jemelon of 125th Street, Inc. v Leon Betesh/Park Seen Rlty Assoc.*, 115 AD2d 381 [1st Dept 1985]). Full evidentiary proof of the ability to cure is not required when seeking a Yellowstone injunction (*Fifth Avenue Restaurant Corp. v RCPI Landmark Properties, LLC*, 13 Misc.3d 1206(A) [Supreme Court, New York Cty 2006]).

Courts, when determining whether the movant has shown an intent to cure, review such things as the tenant's past attempts to cure defects, its willingness to cure as indicated in the motion papers, and any efforts presently being made to address the conditions. For example, where the plaintiff "repeatedly indicat[ed] in its motion papers that it was willing to repair any defective condition found by the court and by providing proof of the substantial efforts it had already made in addressing the majority of conditions listed in the notice to cure", the court

granted the Yellowstone injunction (*Terosal Properties, Inc. v Bellino*, 257 AD2d 568 [2nd Dept 1999]). In so holding however, the court also noted “ [t]he mere fact that the plaintiff challenges the necessity of making the further repairs demanded by the defendant does not negate this showing” (*Id*).

Similar to the instant matter, in *TSI West 14, Inc. v Samson Associates, LLC* , the plaintiff operated a fitness center which defendant complained caused disruptive noise and vibrations. The plaintiff hired acoustical engineers to conduct various tests, contracted for certain changes to be made to reduce the disruptions, and had expended over \$100,000 to correct the problem (8 AD3d 51 [1st Dept 2004]). Thereafter, the defendant served a notice to cure the default alleging the plaintiff was still in violation of the lease. The court granted the Yellowstone injunction because, although the plaintiff submitted an affidavit disputing it was in violation of the lease, it went on to assert that if the court held otherwise, it was willing to cure the alleged defaults (*Id* at 52).

Upon reviewing the initial motion papers, this court had reservations as to whether the plaintiff demonstrated its willingness to cure should the court not agree that it is not in violation of the lease. In the moving papers, the plaintiff only attaches an affidavit of its attorney which is directed solely at disputing whether the plaintiff is in violation of the lease. The attorney does, however, within the seven page affirmation conclusorily state, “plaintiff is ready, willing and able to cure the alleged defaults” (Rubman Affirmation ¶ 14). The affirmation also states the plaintiff cured a leak on the second floor which is part of the basis for the notice to cure (*Id* ¶ 31).

Thereafter plaintiff, at oral argument of the motion, requested leave to file a reply affidavit. After initially denying the request, the court thereafter reconsidered and granted

plaintiff leave to submit the reply. In the reply affidavit, the plaintiff's president expresses his willingness to cure the default, if any, short of vacating the premises (*Nurse Affidavit* ¶ 4). In addition, the president's affidavit details past efforts to remedy the defendant's concerns. These efforts included three meetings between the parties and the second floor tenant who complains of excessive disruptions (*Id* ¶ 6). Furthermore, the plaintiff cancelled all classes for children, stopped all jump roping, and the teachers have been instructed to minimize noise (*Id*). Lastly, the plaintiff has submitted letters in which he affirmatively responds to the second floor tenant's requests to arrange for quiet during specified evenings (*Nurse Affidavit, Exhibit A*). The defendant submitted the affidavit of a tenant which describes the disruptions, however, she also acknowledges the plaintiff cooperates with phone calls requesting music levels to be lowered (*Parks Affidavit* ¶ 12). It is also reiterated that a leak in 2006 which caused damage to the second floor was fixed by the plaintiff (*Nurse Affidavit* ¶ 10). Lastly, it is emphasized that the plaintiff will do further work to cure defaults and is prepared to comply with the court's determination (*Id* ¶ 11).

The submission of the additional affidavit by the plaintiff's president satisfies this court that the plaintiff is, in fact, willing and able to cure any defaults short of vacating the premises. Therefore, the application for a Yellowstone injunction is granted.

The defendant urges this court to require the posting of an undertaking where a Yellowstone injunction is granted. The defendant argues that it is at foreseeable risk of losing its rental income from the second and fourth floor tenants as well as physical damage to the premises.

In opposition to this motion, the defendant submitted affidavits from four tenants of the premises which describe the disruptive noise and vibration which emanate from its martial arts

studio. Several of the affidavits state that the disruptions interfere with their business operations for which a quiet premises is essential. The affidavits are compelling evidence that the defendant may be at risk of losing its rental income from these tenants.

Furthermore, the defendant submits the report of an acoustic consultant which states that the plaintiff's activities appear to generate unreasonable levels of noise into the spaces of the other commercial tenants (*Affirmation in Opposition, Exhibit D*). This report, read along with the affidavits of counsel and of the tenants on the premises, is more compelling than the report submitted by plaintiff's acoustic consultant. This report attributes the vibrations to a ceiling hung HVAC system in the second floor and states the noises at issue are no more intrusive than the noises from the urban environment outside of the building. (*Order to Show Cause, Exhibit E*).

On this preliminary application, the court is persuaded that the plaintiff's studio may be the source of excessive noise and vibrations which are disruptions to the other tenants on the premises. However, this court must follow the policy that Yellowstone injunctions be routinely granted to avoid forfeiture of the tenant's interest, thereby maintaining the status quo, until a determination on the merits is made (*Times Square Stores Corp v Bernice Realty Co*, 107 AD2d 677, 680 [2nd Dept 1985]). To protect the defendant however, especially in light of the court's concerns regarding the disruptions to other tenants, the court may direct the posting of an undertaking (*Id* at 681). To fail to do so would be "patently improper" (*Id*).

The defendant submits that in addition to physical damage to the premises, it is at risk of losing rental income from the second and fourth floors. (*Affirmation in Opposition* ¶ 26). Plaintiff affirms that, if terminated, the subject leases could be re-leased at more than double the rent currently being payed to defendant (*Reply* ¶ 12). Plaintiff does not state how reaches this

conclusion.

It is directed that the plaintiff post an undertaking in the amount of \$100,000 pursuant to CPLR 6212(b). This amount is rationally related to the total damages the defendant may sustain if it is later determined the plaintiff was not entitled to the injunction (*See 61 West 62nd Owners Corp v Harkness Apartment Owners Corp*, 173 AD 2d 372 [1st Dept 1991]).

Conclusion

Therefore, based on the foregoing it is hereby

ORDERED that plaintiff's application for a Yellowstone injunction enjoining defendant, its officers, agents and employees and all other persons acting in consort with it or on its behalf, from directly or indirectly canceling or terminating the written lease agreement dated April 20, 2002 entered into between the parties is hereby granted and it is further

ORDERED that plaintiff post an undertaking in the amount of \$250,000.00 forthwith.

This shall constitute the order and decision of the court.

Dated: April 17, 2008

ENTER:

HON. RICHARD B. LOWE, III

FILED
APR 22 2008
COUNTY CLERK'S OFFICE
NEW YORK