

Koedderitzsch v 541 Constr. Corp.

2008 NY Slip Op 31267(U)

April 28, 2008

Supreme Court, New York County

Docket Number: 0602562/2007

Judge: Emily Jane Goodman

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

*Koedderich Mischs
DBA Spinetrak
- v -
541 Construction Corp*

INDEX NO. 602562/07
MOTION DATE _____
MOTION SEQ. NO. 001
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 *and CWS motion are*
granted as asked

FILED
MAY 01 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/28/08

[Signature]

EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 17

-----X

MISCHA KOEDDERITZSCH,

Plaintiff,

Index No. 602562/07

-against-

541 CONSTRUCTION CORP.,

Defendant.

FILED
MAY 01 2008

COUNTY CLERK'S OFFICE
NEW YORK

-----X
Emily Jane Goodman, J.:

Plaintiff Mischa Koedderitzsch moves for a Yellow
injunction tolling his time to cure alleged defaults under
lease he holds with defendant 541 Construction Corp. In the
alternative, plaintiff moves for a preliminary injunction
pursuant to CPLR 6301. Defendant cross-moves, pursuant to CPLR
6301, for a preliminary injunction seeking, among other things,
an order enjoining plaintiff from using the leased premises in a
manner violative of the building's Certificate of Occupancy and
the Zoning Resolution.

I. Background

Defendant owns a building located at 301 West 37th Street,
New York City. Defendant and plaintiff entered into a commercial
lease (the Lease) for the 6th floor of the building (the
premises) in 2000. The Lease indicated that the premises was to
be used for a computer office, "provided such use is in

accordance with the Certificate of Occupancy for the building, if any, and for no other purpose." Lease, Ex. 2 to Notice of Motion, Article 2. Under Article 3 of the Lease, plaintiff was required to obtain written consent from defendant before making changes to the premises, other than minor changes. See also Article 44.

Plaintiff alleges that, early on in its tenancy, "it became apparent to the Plaintiff that the premises were too ill maintained by management to run a respectable business there." Aff. of Adam Leitman Bailey, ¶ 17. In order to "recover the investment in the premises and force management to be more regular about providing heat and other basic amenities" (*id.*), plaintiff determined to subdivide the space to allow for residential tenants, while maintaining part of the commercial space.

According to plaintiff, defendant was in complete agreement with plaintiff's plans. GVA Williams (GVA), defendant's management company, allegedly inspected plaintiff's architect's plans, upon which it signed off, cooperating with plaintiff thereafter to complete the work. Plaintiff contends that GVA "participated in the conversion of portions of the commercial space to residential space, knowing full well that residential use was what it was meant to be." *Id.* Plaintiff claims to have used defendant's plumbing contractor, and that plaintiff used

GVA's own heating contractors to complete the renovation, with GVA's knowledge. According to plaintiff, the renovations cost approximately \$250,000.

Plaintiff was served with a five-day Notice to Cure (Notice), dated July 19, 2007. Bailey Aff., Ex. 1. The Notice specified that plaintiff was in violation of (1) Article 2 of the Lease, for using the premises for other than a computer office; (2) Articles 3 and 44, for making renovations without defendant's written consent; (3) Article 6, for failure to comply with applicable laws; and (4) Article 15, providing that plaintiff would not use the premises in violation of the Certificate of Occupancy. The Notice also contained other perceived defaults, addressing plaintiff's alleged failure to abide by the Administrative Code of the City of New York, the Building Code, and the Certificate of Occupancy. The Notice defined cure as, essentially, removing all of the changes made to the premises in order to make residential units, and ceasing to use the premises as anything but a computer office.

The Notice provided for a cure period ending July 30, 2007. Plaintiff served the within Order to Show Cause on that date, requesting that this court toll the cure period, and enjoin defendant from taking further action in regard to the premises.

II. Arguments

Plaintiff argues that defendant cannot oust plaintiff from

the premises, or compel him to make any changes, because defendant waived any objection to the renovations when it signed off on the architectural plans, and cooperated in the renovations, knowing full well what the changes entailed. Defendant retorts that, as a result of the renovations, plaintiff has violated both the Certificate of Occupancy and the local Zoning ordinance. Defendant also maintains that the "no waiver" clause in the Lease bars plaintiff from claiming any waiver of the Lease restrictions, and that, in any event, by their nature, plaintiff's violations can never be waived as a matter of law because the use of the premises is in violation of zoning laws.

Defendant also attacks this court's jurisdiction over defendant, based on plaintiff's alleged failure to serve defendant with a summons and complaint during the cure period. In its cross motion, defendant seeks a preliminary injunction against plaintiff's continued use of the premises for residential purposes, and insists on a hefty undertaking, should plaintiff's application be granted.

III. Discussion

A. Plaintiff's Motion for Yellowstone Injunction

A *Yellowstone* injunction is derived from the seminal case of *First National Stores, Inc. v Yellowstone Shopping Center, Inc.* (21 NY2d 630 [1968]).

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.

Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Avenue Associates, 93 NY2d 508, 514 (1999). The party seeking *Yellowstone* relief must establish 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 [internal quotation marks and citation omitted].

Id.; see also *Purdue Pharma, LP v Ardsley Partners, LP*, 5 AD3d 654 (2d Dept 2004). Unlike a preliminary injunction under CPLR Article 63, the plaintiff does not have to show a likelihood of success on the merits. *WPA/Partners LLC v Port Imperial Ferry Corp.*, 307 AD2d 234 (1st Dept 2003); *Stuart v D & D Associates*, 160 AD2d 547 (1st Dept 1990). However, a plaintiff must demonstrate that "a basis exists for believing that a tenant ... has the ability [to] cure through any means short of vacating the premises [internal quotation marks and citation omitted]." *WPA/Partners LLC*, 307 AD2d at 237; see also *Jemaltown of 125th Street v Leon Betesh/Park Seen Realty Associates*, 115 AD2d 381 (1st Dept 1985).

In its initial motion papers, plaintiff professed a willingness and ability to cure when he stated that he could

always evict the residential tenants, and restore the premises to its original configuration. Despite defendant's objections, this statement was sufficient to establish plaintiff's willingness and ability to cure. Additionally, since the motions were briefed, plaintiff has informed the Court that he has served Notices of Termination on his residential tenants, and that "he intends, should they fail or refuse timely to vacate, to commence eviction proceedings after the termination dates." Permissive Supplemental Affirmation, at 1. Plaintiff has also "consulted with three contractors to secure bids to restore the leasehold to a purely commercial arrangement." *Id.* Plaintiff's attorney names the three contractors.

Defendant objects to the Court's acceptance of what plaintiff has entitled a "Permissive Supplemental Affirmation" as it was submitted after the return date of the motion. Defendant also claims that plaintiff is now "acknowledg[ing] his own illegal acts" in commencing to cure his alleged defaults, and that "this should not be condoned by the Court." Affirmation is Reply to Permissive Supplemental Affirmation, at 1. Defendant complains that "there is no limit on when the Plaintiff's illegal subtenants can be expected to vacate - although proceedings brought in the landlord-tenant part of the Civil Court are

labeled 'summary' proceedings, they can take a year or more."¹ Defendant also insists that it is insufficient to say that bids have been requested from contractors, without more specification of when the work will commence, or assurance that it really will.

The Court accepts plaintiff's late submission as defendant also had the opportunity to make a responsive submission. In any event, plaintiff's initial attestation of his willingness and ability to cure was already sufficient.²

Defendant next challenges plaintiff's application on the grounds that the Court has no jurisdiction over defendant because plaintiff failed to serve the summons and complaint on defendant prior to the termination of the cure period, as well as separately from the Order to Show Cause. A copy of the summons and complaint, attached to the Order to Show Cause, was served as ordered by the Court. However, defendant notes that a separate summons and complaint were not personally served upon defendant until August 1, 2007, two days after the cure period

¹Each of the three Notices of Termination states that "[y]our tenancy is effective November 30, 2008," but states, in the next paragraph that "you are required to vacate or surrender possession of the premises to the landlord on or before November 30, 2007." Permissive Supplemental Affirmation, Ex. A. It appears likely that the initial date of November 30, 2008 is a scrivener's error, and that the tenancies were to terminate on November 30, 2007, rather than 2008.

²While defendant complains that it will take a long time to evict plaintiff's tenants, it does not have any suggestion as to how the results could be hastened, or how it itself could evict these residents with more dispatch.

expired.

CPLR 6311 (1) provides that "[a] preliminary injunction may be granted only upon notice to the defendant. Notice of the motion may be served with the summons or at any time thereafter and prior to judgment." This language has been interpreted to mean that "a preliminary injunction is only available in a pending action." *Happy Age Shops, Inc. v Matyas*, 128 AD2d 754, 754 (2d Dept 1987). "[U]nless there is an underlying action which confers statutory authority on the court to grant a preliminary injunction, the court has no jurisdiction to award such relief." *Matter of Hart Island Committee v Koch*, 150 AD2d 269, 272 (1st Dept 1989), quoting *Matter of Caruso v Ward*, 146 AD2d 486, 487 (1st Dept 1989); see also *Uniformed Firefighters Association of Greater New York v City of New York*, 173 AD2d 206, 206 (1st Dept 1991), *affd* 79 NY2d 236 (1992) (pendency of a viable action "indispensable prerequisite" to granting preliminary injunction).

It is common practice to commence an action by service of a summons or summons and complaint on the defendant, contemporaneously with the service of the order to show cause seeking injunctive relief, and this is sanctioned by CPLR 6311 (1). Defendant admits that it received a copy of the summons and complaint with the signed order to show cause, but complains that

this service did not comport with CPLR 311-a,³ because the summons and complaint were not served separately from the order to show cause, but was only annexed to the order to show cause itself.

In support of its argument that this was insufficient service to commence the action, defendant cites to *Iglesias v Rodriguez* (143 Misc 2d 498 [Sup Ct, Kings County 1989]).

In *Iglesias*, the court held that service of a summons and complaint by stapling the documents to the order to show cause was inappropriate because "[a]t best, the summons and complaint appeared to be mere exhibits to the order to show cause, and as such were insufficient for the commencement of an action and acquisition of jurisdiction over the person of the defendant." *Id.* at 499. The *Iglesias* court found that this method of service did not "afford notice of a proceeding to interested parties." *Id.*

However, in the case of *Palladino v Sargent* (6 AD3d 1082 [4th Dept 2004]), the Court, facing the same situation, found that a summons served "only as an attachment" sufficed for good service, because "[t]here is 'no statutory requirement that the summons must be served alone.'" *Id.* at 1084, quoting *Matsuo v*

³CPLR 311-a is directed to service on a limited liability corporation. Presumably, defendant meant CPLR 311, service on a corporation.

Matsuo, 92 AD2d 710, 710 (3d Dept 1983).⁴ In *Matsuo*, the Court found good service where the summons was attached as a final exhibit to the order to show cause, and not, as the defendant would have it, as a separately served document. These appellate cases are on point, and establish that the summons and complaint need not be served separately from the Order to Show Cause.

Moreover, defendant's argument that this Court lacks jurisdiction because service was not made during the cure period, is unpersuasive. As of July 1, 1992, an action is commenced--not by service of the summons and complaint--but rather by the filing of the summons and complaint. Here, the summons and complaint was filed during the cure period, and the fact that service was made after the cure period expired is of no import.

As a result of the foregoing, plaintiff has established his right to a *Yellowstone* injunction, in that he holds a commercial lease; received a notice to cure from defendant; requested injunctive relief prior to the expiration of the cure period and of the termination of the Lease; and has shown that he is prepared and maintains the ability, and, indeed, appears to be attempting, to cure the alleged default, by any means short of vacating the premises.

⁴The *Palladino* Court took note of the contrary holding in *Iglesias*, without discussion.

B. Defendant's Cross Motion for Preliminary Injunction

Defendant seeks a preliminary injunction for an order enjoining plaintiff from continuing the allegedly illegal use of the premises.

CPLR 6301 provides that

[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

In order to show entitlement to a preliminary injunction, plaintiff has to show "a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in [its] favor." *Aetna Insurance Company v Capasso*, 75 NY2d 860, 862 (1990); see also *Casita, L.P. v MapleWood Equity Partners (Offshore) Ltd.*, 43 AD3d 260 (1st Dept 2007).⁵

In opposition to defendant's argument that the building is located in an M1-6 district, which only permits manufacturing and

⁵While plaintiff claims that GVA knew and approved of plaintiff's plans as early as 2000, GVA denies approving any plans offered by plaintiff to renovate the premises for residential use. It does, however, admit to knowledge that there were residential tenants in the building. See *Aff. of Martin Meyer*, at 2.

not residential uses, plaintiff make the conclusory argument that the exception for residential uses in M1-6M zoning districts applies to the building at issue, and further states that upon information and belief, the adjacent building is used residentially. Defendant maintains in reply that plaintiff incorrectly assumed that an M1-6M district is the same as an M1-6 district. Defendant also maintains that the adjoining building to which it assume that plaintiff refers, is covered by the Loft Law. For the first time, defendant submits a letter from the Department of City Planning City of New York Zoning Division, indicating that the building at issue is located in an M1-6 zoning district (although plaintiff has apparently not disputed this contention).

Although it does appear that plaintiff's argument is, as defendant maintains, "a desperate attempt by Plaintiff to validate his illegal use of the premises," the determination of whether the injunction should be granted is held abeyance pending submission by plaintiff of a response to defendant's two arguments raised in reply. Both sides are also free to submit expert affidavits on the issue.⁶

⁶Even if zoning violations are established, defendant would not be entitled, at this point in time, to terminate plaintiff's lease, because plaintiff has alleged that he has the willingness to cure. Plaintiff has also represented that he commenced curing the alleged defaults by serving Termination Notices. See *Britti Corp. v Perry Thompson Third LLC.*, 26 AD3d 235 (1st Dept 2006) (*Yellowstone* properly granted despite tenant's failure to obtain

Plaintiff is also directed to post an undertaking. See CPLR 6312 (b); *Cohn v White Oak Co-op. Housing Corp.*, 243 AD2d 440 (2d Dept 1997) (improper to fail to order undertaking in motion for *Yellowstone* injunction). The amount of the undertaking should be "rationally related to the quantum of damages which [defendant] would sustain in the event that [plaintiff] is later determined not to have been entitled to the injunction." *61 West 62nd Owners Corp. v Harkness Apartment Owners Corp.*, 173 AD2d 372, 373 (1st Dept 1991).

Defendant provides the Court with what it believes amounts to irreparable harm which might arise as a result of plaintiff's allegedly illegal use of the property, such as potential penalties which might issue from the Department of Buildings for violations of the Zoning Resolution or the Certificate of Occupancy; and the potential for the loss of insurance coverage, should a residential occupant be involved in an accident on the premises. These potential costs are, however, speculative at

building permits and landlord's prior written consent before altering the premises; termination was not warranted absent evidence that the tenant was unwilling or unable to cure the breach); *Duane Reade v Highpoint Assoc., IX, LLC.*, 1 AD3d 276 (1st Dept 2003) (*Yellowstone* should have been granted to tenant who subleased part of premises for use as a thrift shop, in violation of the lease; tenant evidenced the ability to cure by sending subtenant a notice of default); *ERS Enterprises, Inc. v Empire Holdings LLC.*, 304 AD2d 433 (1st Dept 2003) (*Yellowstone* properly granted despite tenant's failure to obtain landlord's consent to alterations because tenant could restore leased restaurant to its original condition).

this point, and so, incapable of quantification. The undertaking is set at the sum of \$10,000.

Defendant is also entitled to use and occupancy, in the amount of rent due under the Lease.

Accordingly, it is

ORDERED that plaintiff Mischa Koedderitzsch's motion for a *Yellowstone* injunction is granted, and the period in which to cure any alleged lease defaults under the Lease is tolled pending the completion of this action or further order of this Court; and it is further

ORDERED that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through an attorney, agent, servant, employee or other person under the supervision of control of defendant or otherwise, from taking any action to terminate plaintiff's leasehold, or interfere in plaintiff's interests in, and enjoyment of, the leasehold; and it is further

ORDERED that the undertaking is fixed in the sum of \$10,000 conditioned that the plaintiff, if it is finally determined that he was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that defendant's cross motion for a preliminary injunction is denied to the extent defendant seeks to vacate the temporary restraining order, is held in abeyance with respect to whether plaintiff is enjoined from using the premises in a manner that violates the Certificate of Occupancy and applicable zoning laws pending the additional submissions above on or before June 2, 2008, and is granted to the extent that plaintiff is hereby directed to post the aforementioned bond forthwith and to continue paying rent to defendant at the contractual amount, as use and occupancy, until the completion of this action; and it is further

ORDERED that a settlement conference shall be held on May 22, 2008 at 12:00pm (the parties are directed to either appear or be available by telephone); at the conference, plaintiff shall advise of the steps he has taken subsequent to service of termination notices to evict the residential tenants and of the progress of such termination.

Dated: April 28, 2008

ENTER:


 COUNTY CLERK'S OFFICE
 NEW YORK
 MAY 01 2008
 J.S.C.
EMILY JANE GOODMAN

FILED