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

PRESENT: Herman Cahn PART 49M
Justice

Jan Companies of NY Holdings LLC

INDEX NO. 604098/07

MOTION DATE

- v -

734-740 Broadway Realty LLC

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

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

Dated: 6/13/08

Herman Cahn
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: IAS PART 49

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JAN COMPANIES OF NY HOLDINGS LLC,

Plaintiff,

-against- Index No. 604098/07

734-740 BROADWAY REALTY LLC,

Defendant.

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CAHN, J.:

This is an action for Yellowstone and related equitable relief by a commercial tenant, plaintiff Jan Companies of NY Holdings LLC (Jan), with respect to premises known as and located at 734-736 Broadway, Brooklyn, New York (Premises) and owned by defendant-landlord 734-740 Broadway Realty LLC (Realty).

Jan requests an order granting: (a) a preliminary injunction restraining Realty from taking any steps to terminate Jan's lease or to cause its termination based on any of the alleged defaults asserted in the Notice to Cure, dated November 7, 2007 (Notice to Cure), or to otherwise interfere with Jan's possession and use of the Premises; (b) tolling and staying the running of Jan's time to cure said alleged defaults; (c) vacating the Notice to Cure; (d) a preliminary mandatory injunction requiring Realty to complete or to pay to complete the structural work required at the Premises so that Jan can do its anticipated interior renovations and open a Burger King restaurant therein; and (e) pursuant to CPLR 602 (a), staying the summary non-payment proceeding pending in the Civil Court of the City of New York, Kings County, entitled 734-740

Broadway Realty LLC v Jan Companies of NY Holdings LLC (L & T Index No. 101239/07) (Summary Proceeding), or consolidating it with this action.

Pending the hearing and determination of the motion, the Court granted Jan a temporary restraining order to preserve the status quo.

As discussed below, the Court grants Jan's request for: (a) a Yellowstone injunction restraining Realty from taking any steps to terminate Jan's lease or to cause its termination based on any of the alleged defaults asserted in the Notice to Cure, or to otherwise interfere with Jan's possession and use of the Premises; (b) a toll of Jan's time to cure said alleged defaults; and (c) a stay of the Summary Proceeding pending resolution of this action. Jan's request for a preliminary mandatory injunction and to vacate the Notice to Cure are denied.

BACKGROUND

Jan, the subsidiary of a company that owns and operates Burger King franchise restaurants, entered in to a lease, dated August 1, 2006, to rent from Realty, the basement, first, second and third floors at the Premises (Lease). The Lease provided that Jan would use the Premises as a "Burger King, Fast Food Restaurant" (Lease, ¶ 3) and contemplated that Jan would perform "Initial Alterations" to the Premises (Lease, ¶ 42).

Paragraphs 42, entitled "Work To Be Performed," and 58, entitled "Maintenance and Repair" are relevant to the instant dispute. Paragraph 42 provides, in relevant part:

> Tenant has examined and inspected the demised premises. Tenant agrees to accept possession of the demised premises 'AS IS' except as otherwise expressly provided herein. Landlord shall not be responsible for making any improvements, alterations or repairs therein or for spending any other money to prepare the demised premises for Tenant's occupancy. All other improvements and alterations to the demised premises prior to or at any time after the

commencement of the term of this lease shall be made at the sole cost and expense of Tenant, in accordance with the provisions of this lease.

* * *

Landlord shall be responsible to reimburse Tenant for any fines or costs to remove any violations existing prior to the date hereof (the 'Existing Violations') except for any violations which would be removed in the normal course of Tenant's Alterations without any additional cost and expense to Tenant.

In the event that Tenant encounters any structural damage to the Building or the Building systems other than such damage that is attributable to the negligence or act of Tenant, its employees, agents and/or contractors, or resulting from Tenant's actual Alterations of the Premises, during Tenant's Initial Alterations which shall make it impractical, in Tenant's reasonable discretion, for Tenant to continue with such Initial Alterations, Tenant shall promptly provide Landlord with written notice of such damage, and Landlord shall with all reasonable diligence repair such damage at its sole cost and expense, and Tenant shall be entitled to a one-day tolling of any obligations pursuant to this Lease, including without limitation, its obligation to pay Base Rent . . . until such time as Landlord has caused such structural damage to be properly repaired or Tenant is able to continue its alterations without interruption, provided Landlord shall continue to diligently make and complete said repairs at its sole cost and expense.

Paragraph 58 states, in pertinent part:

Landlord shall maintain the exterior of the Building (excluding any modifications made by Tenant), make all structural repairs and replacements to the interior and exterior of the Building and Demised Premises, including the structural elements of the roof, columns, slabs, exterior walls, foundations, joists and load-bearing items, unless such repairs and /or replacements are attributable to the negligence or act of Tenant, its employees, agents and/or contractors or necessitated by any alterations or modifications performed by Tenant. Landlord shall not be required to make any repairs where same were made necessary by negligence of Tenant, employees, agents, licensees or contractors or necessitated by any alterations or modifications performed by Tenant.

Additionally, paragraph 15 of the Lease rider provides that:

> Notwithstanding anything to the contrary herein, the Tenant shall duly obey and comply with all public laws, ordinances, rules or regulations relating to the use of the leased premises; provided, however, that any structural changes in the building or the leased premises, required by any such law, ordinance, rule, or regulation shall be made by Landlord without expense to Tenant.

According to Jan, after entering into the Lease, it retained licensed architects, that prepared and filed the required plans to renovate the Premises for use as a Burger King restaurant. Jan proceeded to hire a contractor, Nehpeps Corp. (Nehpeps), to perform the renovations at an agreed bid price of $710,000. According to Jan, when Nehpeps commenced the demolition of the interior space of the Premises, a three-story wood-framed structure, it discovered that the it did not have masonry weight bearing walls on either side of the Building. Jan alleges that it was advised that this condition was both dangerous and contrary to the New York City Administrative Code. Jan's engineer, Stuart D. Gold, P.E., thereupon inspected the Premises and reported that:

> This building cannot accommodate the commercial requirements for floor loading for the second and third floors. As such, these floors could not allow for restaurant usage. Modifications to the existing masonry infill walls was not possible because it would likely have caused an unstable condition to the two adjacent buildings and be hazardous to workers and passerby. Without modification, the walls would never have been sufficient to provide load bearing capacity for Tenant's intended commercial use.
>
> The only alternate structural solution . . . was to install a new steel superstructure within the perimeter of the existing building shell so that the exterior walls would no longer be load bearing and would act merely as a skin to the building. After interior demolition was completed, steel structural supports were erected to provide building infrastructure and to insure the structural stability of the two adjacent buildings.

Jan's architect also researched the situation, and by letter dated February 5, 2007, informed Jan that:

> We have reviewed the NYC Administrative Code in connection with our new proposed use on the second floor of this building. As you are aware, we propose to change the second floor to Eating and Drinking and increase the occupancy of, creating a Public Assembly space. Currently the only permitted uses in frame construction are one and two family residences; and even then under very controlled circumstances.

Jan alleges that, given the exigent circumstances and safety concerns, it authorized its contractor to remove the rotted wood frame and to install steel beams to insure the structural stability of the adjacent buildings and to provide a support structure for future construction at the site. Jan contends that, under the Lease, this work was Realty's responsibility, but it undertook the work for public safety reasons fully expecting that Realty would pay for the work.

Jan also alleges that, after the installation of the steel beams, it ceased further work on the Premises, and made numerous calls to Realty to discuss Realty's obligation to make/pay for these repairs. When it did not receive a response, Jan's attorney send a letter to Realty, dated July 18, 2007, describing the problems encountered, and demanding that Realty comply with the Lease. A meeting was eventually held in August 2007, attended by representatives of Jan and Realty. Realty took the position that Jan, not Realty, was responsible for this work, and the meeting ended without resolution.

Thereafter, Neheps and the structural subcontractor, placed mechanics' liens against the Premises.

Jan alleges that following work is Realty's obligation, and must be completed before Jan can proceed with its contemplated interior renovations: (a) encapsulating the demising walls; (b)

rebuilding the three floors of the Premises with new steel "W" beams, columns and footings in the basement; and (c) installing a new roof to support HVAC units. Jan submits that this additional work is necessary to make the Premises safe and enable commercial usage, and would cost $ 379,555.00, plus $40,167.75 for certain fees already incurred.

On November 7, 2007, Realty served the Notice to Cure, based upon Articles 17 and 44 of the Lease, alleging that Jan allowed mechanics' liens to be placed against the Premises. The Notice to Cure demanded that Jan cure the defaults set forth therein on or before December 19, 2007, or Realty would proceed to terminate the Lease. On November 7, 2007, Realty also commenced the Summary Proceeding for non-payment of rent in the amount of $23,433.75.

DISCUSSION

Jan contends that it is entitled to the requested relief pursuant to the provisions of the Lease, including paragraphs 42 and 58 thereof. It maintains that the disputed work is structural in nature, and is necessary to create a structurally sound building that is code compliant. Jan submits that, pursuant to the Lease, Realty is responsible for this work, and it is entitled to an abatement of rent until said work is completed.

Realty contends that Jan is not entitled to any of the relief it seeks. Realty argues that paragraph 42 of the Lease makes it clear that the Premises were to be delivered to Jan "as is" and relies on the sentences stating that it

> shall not be responsible for making any improvements, alterations or repairs therein or for spending any other money to prepare demised premises for [Jan's] occupancy. All other improvements and alterations to the demised premises prior to or at any time after the commencement of the term of this lease shall be made at the sole cost and expense of Tenant . . . .

Realty further argues that the latter portion of paragraph 42, which Jan relies upon, is not applicable to the instant case, and is not a basis for any of the relief Jan seeks herein. Alternatively, Realty takes the position that, even if Jan's reading of paragraph 42 is correct, Jan failed to follow the appropriate procedures dictated under the terms of the Lease to give notice to Realty with respect to making said structural repairs, and therefore, Realty has no obligation to make or pay for said repairs.[1]

It is well settled that

> [t]he purpose of a Yellowstone injunction is to allow a tenant confronted by a threat of termination of the lease to obtain a stay tolling the running of the cure period so that, after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold

(Empire State Bldg. Assocs. v Trump Empire State Partners, 245 AD2d 225, 227 [1st Dept 1997] [internal citations omitted]; see also WPA/Partners LLC v Port Imperial Ferry Corp., 307 AD2d 234, 236 [1st Dept 2003]; 225 East 36th Street Garage Corp. v 221 East 36th Owners Corp., 211 AD2d 420, 421 [1st Dept 1995]). Yellowstone injunctions are routinely granted to avoid forfeiture of a tenant's substantial interest in the leasehold premises (Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs., 93 NY2d 508, 514 [1999]).

To obtain a Yellowstone injunction, the tenant need only show that:

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[1] Realty's argument that the "structural problems" which Jan encountered "resulted solely from [Jan's] actual alterations" and therefore any changes necessary to support its planned construction must be made at their sole cost and expense, has been rejected in a line of arguably analogous cases involving asbestos abatement work (see Linden Blvd., LP v Elota Realty Co., 196 AD2d 808 [2d Dept 1993]; see also P.A. Bldg. Co. v City of New York, 10 NY3d 430 [2008]; Solow v Avon Products, Inc., 301 AD2d 441 [1st Dept 2003]; Chemical Bank v Stahl, 272 AD2d 1 [1st Dept 2000]; Wolf v 2539 Realty Assocs., 161 AD2d 11 [1st Dept 1990]).

> (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

(225 East 36th Street Garage Corp., 211 AD2d at 421 [internal citations omitted]).

Jan has made a satisfactory showing as to each of these required elements, including "the ability and willingness to cure" criteria. Jan's Vice President, Janice M. Matthews, in her affidavit, sworn to December 12, 2007, states, at paragraph 26 that "plaintiff is ready, willing and able to perform any action to cure the purported default in the event that this court deems that plaintiff is in default of the Lease" (see Gyncor, Inc. v Ironwood Realty Corp., 259 AD2d 363 [1st Dept 1999]).

Accordingly, the Court grants Jan's request for a Yellowstone injunction. Since common questions of fact and law that are presented in this action and in the Summary Proceeding, the Court also grants Jan's request for a stay of the Summary Proceeding pending resolution of this action.

Jan's request for a mandatory preliminary injunction, however, is denied, as is its request for an order vacating the Notice to Cure. To succeed on a motion for a preliminary injunction, a movant must show: (1) a probability of success in the underlying action; (2) danger of irreparable injury in the absence of an injunction; and (3) a balancing of the equities in its favor (Aetna Ins. Co. v Capasso, 75 NY2d 860, 862 [1990]; Coinmach Corp. v Fordham Hill Owners Corp., 3 AD2d 312, 314 [1st Dept 2004]).

In addition to not satisfactorily demonstrating each required element, the mandatory preliminary injunction that Jan seeks would impermissibly grant it the ultimate relief sought,

prior to joinder of issue and discovery (see Northern Funding, LLC v 244 Madison Realty Corp., 41 AD3d 182 [1st Dept 2007] citing St. Paul Fire & Marine Ins. Co. v York Claims Service, Inc., 308 AD2d 347, 348- 49 [1st Dept 2003]).

As explained by the First Department, in SHS Baisley, LLC v Res Land, Inc. (18 AD3d 727, 728 [2d Dept 2005]):

> [A]bsent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment (see St. Paul Fire & Mar. Ins. Co. v York Claims Serv., 308 AD2d 347, 348-349 [2003]). In addition, mandatory preliminary injunctions are not favored and should not be granted absent extraordinary or unique circumstances, or where the final judgment may otherwise fail to afford complete relief, especially if the status quo would be disturbed (see St. Paul Fire & Mar. Ins. Co. v York Claims Serv.,; Rosa Hair Stylists v Jaber Food Corp., 218 AD2d 793 [1995]; Xerox Corp. v Neises, 31 AD2d 195 [1968]; see also 67 NY Jur 2d, Injunctions § 55).

No such extraordinary or unique circumstances are presented here. Jan will be adequately protected by the relief being granted herewith.

CONCLUSION

Jan Companies of NY Holdings LLC 's motion is granted with respect to its request for: (a) a Yellowstone injunction restraining 734-740 Broadway Realty LLC from taking any steps to terminate Jan's lease or to cause its termination based on any of the alleged defaults asserted in the Notice to Cure, or to otherwise interfere with Jan's possession and use of the Premises; (b) a toll of Jan Companies of NY Holdings LLC's time to cure said alleged defaults; and (c) a stay of the Summary Proceeding pending resolution of this action.

Jan Companies of NY Holdings LLC's motion is denied with respect to its request for an order granting a preliminary mandatory injunction and for an order vacating the Notice to Cure.

Settle Order providing for an adequate undertaking.

Dated: June 13, 2008

ENTER:

J.S.C.