

Artisan Blue, Inc. v Quartz Assoc., LLC
2008 NY Slip Op 31696(U)
June 9, 2008
Supreme Court, New York County
Docket Number: 0600213/2008
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GISCHE
Justice

PART 10

ARTISAN BLUE INC

INDEX NO. 600213/08

MOTION DATE _____

- v -

MOTION SEQ. NO. 2

QUANTZ ASSOCIATES

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUN 13 2008

COUNTY CLERK'S OFFICE
NEW YORK

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

Dated: 6/09/08

J. GISCHE
HON. JUDITH J. GISCHE 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: Part 10

ARTISAN BLUE, INC.,

Plaintiff,

-against-

QUARTZ ASSOCIATES, LLC, PROFILE
ENTERPRISES, L.P. AND EMPIRE
MANAGEMENT AMERICA CORP.,

Defendants.

Decision/Order

Index No.: 600213/08

Mot. Seq.: 002

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS

NUMBERED

OSC, AJ affid, JAF affirm, exhs.....	1
Notice of Cross-Motion, BF affid, NP affid, CMN affid, exhs.....	2
Reply affirm (JAF).....	3
Reply affirm (CMN).....	4

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 JUN 13 2008
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 NEW YORK

Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Plaintiff Artisan Blue, Inc. is the lease tenant ("tenant") of a commercial premises located at Suite Penthouse A at 250 Fifth Avenue in Manhattan (the "premises"), which is owned by defendant Quartz Associates, LLC ("landlord"). The lease, dated April 22, 2003, was extended by addendum dated April 17, 2006, which also added Penthouse Suite B to the premises.

Defendants Profile Enterprises L.P. ("Profile") and Empire Management America Corp. ("Empire") are the former owner and managing agent of the premises, respectively.

The lease and the addendum were entered into by tenant and Profile.

Tenant uses the premises as a “stylist studio and for residential living purposes.” On or about September 24, 2007, defendant Empire sent tenant a notice that it had violated the lease by using the premises “for living purposes and other activities that are not permitted under the lease” (the “first notice”). Tenant was given ten business days to cure said violation, which was subsequently extended by defendant Profile

In response to the first notice, plaintiff filed an application for a Yellowstone injunction by Order to Show Cause (the “prior application”). The cure period was extended by the parties’ agreement to January 31, 2008. On January 28, 2008 the court granted a temporary restraining order tolling the cure period pending determination of the prior application. On or about February 4, 2008, Landlord sent tenant another ten business day Notice to Cure (the “second notice”), claiming that there were numerous violations of the lease, to wit: [1] the landlord claimed that the tenant was operating a “hair salon” at the premises without a license; [2] that the premises is occupied residentially; and [3] that tenant has installed fixtures and otherwise altered the premises. Ashley Javier (“Javier”), president and sole officer, director and shareholder of tenant-plaintiff, claims that he never received the second notice by mail or otherwise.

Defendants served a third notice to cure on tenant in court on February 20, 2008, which alleges that plaintiff is in default of the lease because it has trespassed and/or squatted on the roof of the premises (the “third notice”).

By order dated February 20, 2008, defendants’ attorney “unequivocally indicated on the record that the notice to cure underlying [the prior application] was withdrawn and two subsequent notices were served instead.” These two later notices are the subject

matter of the instant Order to Show Cause. Therefore, the court denied the prior application for a Yellowstone injunction as moot. The cure period flowing from the second notice would have ended on February 20, 2008, but the court extended the prior temporary restraining order pending a determination of the instant Order to Show Cause.

As a preliminary matter, while the plaintiff's claim that the second notice was not properly served may be a defense in any civil court proceeding that may eventually be commenced, this court must nonetheless determine whether plaintiff is entitled to the equitable relief it seeks in the instant order to show cause.

There is no dispute that the lease expressly limits tenant's use of the premises to "general and executive offices." However, tenant argues that the course of dealings between tenant and defendants negate the non-waiver and merger clauses contained in the lease and that the landlord has effectively consented to tenant's present use of the premises. Tenant also points to evidence that suggests that the premises was designed for residential use, namely, certain residential fixtures located at the premises and the prior tenant's residential use of the premises. Tenant maintains that defendants claim that it is operating a hair salon at the premises is untrue. Rather, tenant states that it merely does some hair styling which is a component of his work for clientele. As for the alterations, tenant contends that "prior to each such alteration, [Javier] spoke with the managing agent and asked for permission. [Empire] approved the alteration and expressly required [tenant] to use only 'the building's contractors' and [Empire] furnished the names and address of such contractor, whom [Javier] then retained."

Tenant contends that his use of the roof has been specifically authorized by the defendants. Tenant states that "at the inception of the lease... the premises was

specifically listed as 'rental premises with rooftop.' " Tenant also states that the prior tenants utilized the rooftop in the same fashion that plaintiff now uses it.

Tenant further claims, however, that if this court should find it violated the lease, it stands ready, willing and able to correct it. It, therefore, seeks by this motion a Yellowstone injunction tolling the period in which it has to cure the claimed violations pending determination of the underlying dispute about whether such lease violations actually exist. Landlord opposes tenant's request for a Yellowstone injunction and has cross moved for declarations finding the tenant in default of the lease. If the case is not dismissed, defendants seek an order requiring tenant to post an undertaking and pay ongoing use and occupancy and other charges due under the lease.

Tenant states that it is prepared to cure each alleged default. Specifically, tenant is willing to vacate the premises for residential purposes, discontinue its use of the rooftop, and continue its business related activities thereat. Tenant states that if a license is required to conduct hair styling as it is related to its business at the premises, then it is willing to get such a license. Tenant finally contends that the posting of an undertaking is not warranted on this motion because plaintiff has timely paid all rent and other associated charges and will continue to do so for the duration of the lease.

Defendants oppose the application, arguing that tenant cannot establish the ability or desire to cure the lease violations because it admits the lease violations. They claim that the use clause has not been and cannot be waived, that there is no dispute that tenant is prohibited from operating a hair salon and that the tenant is indisputably a trespasser on the roof.

For the reasons that follow the motion is granted and the cross-motion is denied.

The purpose of a Yellowstone injunction is to allow a tenant, threatened with the termination of its lease, to obtain a stay. The stay tolls the running of the cure period so that, if there is an unfavorable determination against tenant of the merits, the tenant may still cure the defect and avoid a forfeiture of the leasehold. First Natl. Stores v. Yellowstone Shopping Ctr., 21 NY2d 630 (1968); Long Island Gynecological Servs. v. 1103 Stewart Avenue Associates, 224 AD2d 591 (2d Dept 1996). In order to obtain a Yellowstone injunction the tenant must demonstrate that: [1] it holds a commercial lease; [2] it has received from the landlord a threat that the lease will be terminated; [3] it requested injunctive relief prior to the termination of the lease and [4] it is prepared and able to cure the alleged defaults. Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Associates, 93 NY2d 508 (1999).

Tenant has established all of these elements. Defendants do not dispute that tenant has established elements [1] through [3]. At most, defendants take issue with tenant's preparedness and ability to cure the alleged defaults. However, defendants are incorrect. Tenant has demonstrated that it has a desire to cure the alleged defaults by quitting its residential use and use of the rooftop of the premises and by discontinuing its hair-styling services offered at the premises. This cure is easily accomplished if it become necessary. It has a long term investment at the premises. Thus tenant has established the right to Yellowstone relief.

The court rejects defendants contention that tenant has admitted violations of the lease and therefore, Yellowstone relief is not available. Here there are issues for future determination, to wit, whether or not tenant breached the lease by: [1] operating a hair salon at the premises; [2] the unauthorized installation of fixtures and other alterations; or

[3] making use of the premises for residential purposes. Tenant contends that it does not operate a hair salon, but merely performs hair styling ancillary to its business of fashion and style consulting. Javier has stated that he sought and obtained authorization for all the nonstructural alterations made to the premises. He claims that defendants, as a condition, required tenant to obtain the building's contractor for these alterations. Based on this record, there are issues of fact and credibility from which a reasonable trier of fact may conclude that a hair salon was not operated at the premises and unauthorized alterations to the premises did not take place.

Similarly, it is unclear whether tenant's residential use of the premises serves as a violation of the lease or whether landlord acquiesced to such use. In Simon & Son Upholstery v. 601 W. Assoc., 268 A.D.2d 359 [1st Dept 2000], the landlord also argued that the subject lease prohibited the tenant's use of the premises as a photography studio because the lease specified a different use and contained nonwaiver and merger clauses (id. at 359-360, 702 N.Y.S.2d 256). The First Department rejected that argument, because "[w]hile no explicit consent can be found in the record, it is clear from the course of dealings between the parties that the landlord consented to the use of the premises for a studio" (id. at 359). The rationale underlying the Simon Court's decision was that a waiver will be found in spite of the lease's non-waiver clause when the landlord is actively involved with the tenant in the non-performance of a lease obligation (id. at 359). Because the course of dealings may serve as "sufficient indicia that the reasonable expectations of both parties under the original lease were supplanted by subsequent actions" (id. at 360), tenant may ultimately prevail on its defenses to the alleged defaults. (see e.g. U.B.O. Realty Corp. v. Mollica, 257 A.D.2d 460 (1st Dept 1999).

Defendants' reliance on Excel Graphics Technologies, Inc. v. CFG/AGSCB 75 Ninth Ave., L.L.C., 1 A.D.3d 65 [1st Dept 2003] is misplaced. In Excel, the alleged breach of the lease was an illegal sublet. The subject lease contained two specific non-waiver clauses which provided that the building directory's listing of subtenant's name would not be deemed a consent to a sublet and that the landlord's acceptance of rent with knowledge of tenant's breach would not constitute a waiver of the breach. The First Department held that the landlord had not affirmatively waived these nonwaiver clauses and denied the tenant's application for a Yellowstone injunction. Here, the lease contains general nonwaiver and merger provisions.

Based on the same reasoning, defendants have not established entitlement to a declaration that neither tenant nor Javier are permitted to residentially occupy the premises, or that neither tenant nor Javier are permitted to occupy the roof of the premises.

There is no dispute that neither plaintiff nor Javier are entitled to operate a hair salon at the premises. In fact, plaintiff affirmatively alleges that a hair salon does not operate at the premises. Therefore, defendants are entitled to a declaration that neither tenant nor Javier are permitted to operate a hair salon at the premises

Although landlord seeks an undertaking, it has not shown how this is necessary should it turn out that the Yellowstone injunction was improperly granted. The court therefore makes no direction about a bond. Instead it orders that the tenant shall pay monthly use and occupancy in the amount otherwise reserved as rent in the lease as a condition to the injunction. This shall be paid as rent comes due under the lease.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for a Yellowstone injunction is granted and the period in which plaintiff can cure any defaults under the lease set out in the Notice to Cure is hereby tolled pending final adjudication of this matter; and it is further

ORDERED that the continuance of the Yellowstone injunction is conditioned upon plaintiff paying monthly use and occupancy to defendant in the same amount reserved as rent in the lease, and it is further

ORDERED that defendant's cross-motion is granted only to the extent that the court hereby declares that neither tenant nor Ashley Javier nor any other individual or entity are permitted to operate a hair salon at the premises.; and it is further

ORDERED that a **preliminary conference is set before this court for July 10, 2008 at 9:30 am**; and it is further

ORDERED that an requested relief not otherwise granted herein is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
June 9, 2008

FILED SO ORDERED:
 JUN 13 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

J. J.S.C. 