

**North Sea Assoc., LLC v Payton Lane Nursing  
Home, Inc.**

2008 NY Slip Op 32065(U)

July 10, 2008

Supreme Court, Suffolk County

Docket Number: 0010083/2008

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

**Present:**HON. EMILY PINES

J. S. C.

Original Motion Date: 05-14-2008  
Motion Submit Date: 05-21-2008  
Motion Sequence No.: 001 MG

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NORTH SEA ASSOCIATES, LLC,

**Plaintiff,****-against-**

PAYTON LANE NURSING HOME, INC,

**Defendant.**Attorney for Plaintiff

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Plaintiff, North Sea Associates, LLC (“North Sea”) moves, by Order to Show Cause (motion sequence number 001) for a Preliminary Injunction generally referred to as a “Yellowstone” injunction, restraining the Defendant, Payton Lane Nursing Home, (“Payton Lane”) from taking any steps to interfere with North Sea’s commercial leasehold interest in real property in Southampton, New York, pending this Court’s final determination of Plaintiff’s Fourth Cause of Action in its complaint. The Fourth Cause of Action seeks a Declaratory Judgment that Plaintiff, operator of a nursing home facility on the premises, is not obligated to pay Defendant what is referred to in the Lease between the parties as “Approved Cost Rental” unless and until Plaintiff receives payment for residents from Medicaid. In its Counterclaim Defendant asserts that once the nursing facility achieves an average daily occupancy of 70% for three months, the Plaintiff is required to pay an “Approved Cost Rental” each month in an amount equal to one twelfth of 70% of certain amounts set forth on a Department of Health rate sheet. Plaintiff asserts that it is not obligated to pay the Approval Cost Rental unless and until it receives payment from Medicaid.

While the parties were in the process of setting forth their underlying dispute, which the Court summarizes above, the following events occurred. On April 15, 2008, Plaintiff received a “Notice of Default” from the Defendant demanding that Plaintiff pay Defendant the amount

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of \$349,982.67, as due for “Approved Cost Rental” . Section 19 of the Lease states that in the event of a Default in making payment of the “Approved Cost Rental”, the Plaintiff must make payment within 10 days following notice of default. It also provides that upon such default, the Defendant shall serve 30 days’ written notice of termination of the Lease and, upon expiration of the 30 days, the Lease shall end and expire. After Plaintiff received the Notice of Default, and prior to termination under the terms of the lease, in April 17, 2008 Plaintiff served Defendant with the Complaint containing the request for declaratory relief, inter alia, as described above. This Court signed a Temporary Restraining Order on April 23, 2008, prohibiting the Defendant, until further Order of the Court from “(t)aking any steps to terminate, cancel or interfere with North Sea’s leasehold interest in the Premises and North Sea’s interests in and under the Lease”. In addition, the Court ordered the Plaintiff to effect service pf the TRO and the papers upon which it was granted on the Defendant by “(p)ersonal service pursuant to CPLR §311 on or before April 28, 2008.”

Plaintiff asserts that it served both the President of Defendant by personal delivery on April 26, 2008 and effected service upon the Secretary of State, on April 28, 2008. The Affidavit of Service annexed to Plaintiff’s Reply papers describes a confrontational scene in which the Defendant’s President allegedly attempted to evade service but was given the papers containing the TRO as he fled in his automobile. Defendant’s President asserts that he was not in New York on the day in question and found the papers containing the TRO on his lawn the next day when he returned home.

Defendant asserts that since Plaintiff never effectuated service as required, the Termination of the lease went forward as per Defendant’s Notice, since the violation was not cured as per the terms of the Lease. Defendant also argues that service on the Secretary of State is improper, since the Secretary of State is designated solely as an agent for service of process and not motion papers such as contained herein. In addition, the Defendant states, based on Section 31 of the Lease, that the Plaintiff is not entitled to any abatement, reduction deduction or suspension of sums payable under the lease unless and until the Tenant obtains a final, non appealable judgment against the Landlord. Thus, according to Defendant, Plaintiff has bargained away the right to “Yellowstone” relief. Finally, Defendant alleges that Plaintiff has failed to sustain the burden of demonstrating entitlement to injunctive relief.

Plaintiff argues that Defendant’s President was properly served. However, it further alleges that such is irrelevant as it also effectuated service on the Secretary of State as an

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authorized agent under CPLR§311 for service upon whom process against a corporation can be served. *See, BCL §304*. It asserts that because the Court authorized service under CPLR §311, the Defendant cannot now argue that compliance therewith is not proper. Plaintiff also alleges that, under the terms of the lease, Plaintiff is not seeking abatement or deferment of deduction of the rent; but rather, is asserting that the calculation of the rent claimed by Defendant under the “Approved Cost Rental” clause is simply incorrect. Finally, Plaintiff asserts that it meets the burden of establishing entitlement to a “Yellowstone” injunction because it is a tenant of a commercial lease; it has received a notice to cure; it has made a request for injunctive relief prior to termination of the lease; and both prepared and has the ability to cure the alleged default by means short of leaving the premises. *See, Xiotis Restaurant Corp. v LSS Leasing Ltd. Co., 2008 WL878941 (2d Dep’t 2008)*.

The controverted section of the parties’ Lease states as follows: “Except as otherwise may be specifically provided in this Lease, this is an absolutely net lease; this lease shall not terminate nor shall Tenant have any right to terminate this lease; nor shall Tenant be entitled to any abatement, deduction, deferment, suspension or reduction of, or setoff, defense or counterclaim against, any rentals, charges, or other sums payable by Tenant under this lease (unless Tenant obtains a final, non-appealable Judgment against Landlord, in which event any amounts owned (sic) by Landlord to Tenant pursuant to said judgment may be offset against the Minimum Rental and Approved Costs Rental but not the Certified Debt Service . . . .”

Where a contract is clear and unambiguous, it is to be interpreted in accordance with its language and the court will not delve into extrinsic evidence as to what was or what was not intended by the instrument. *South Road Associates LLC v International Business Machines Corp, 2 AD 3d 829, 770 NYS 2d 126 ( 2d Dep’t 2003)*.

In this case, Plaintiff is not seeking an “abatement”, “deferment” or “setoff” of the rent; but, rather, seeks by declaration, an Order that no Approved Cost Rental is due pursuant to Section 3(c) of the parties’ lease. The Defendant seeks identical relief in mirror form in its own counterclaim. Accordingly, the terms of the parties’ lease do not bar the action for a declaratory judgment. The action for a declaratory judgment is an appropriate underlying action when a Yellowstone injunction is sought.

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### **YELLOWSTONE INJUNCTION**

A tenant is entitled to a Yellowstone Injunction, tolling the running of a cure period, so that after a determination of the merits, a tenant would be permitted to cure the defect and avoid forfeiture of the leasehold upon a showing that 1) the tenant holds a commercial lease on the premises; 2) the tenant was served by the Landlord with a notice of default, notice to cure or threat of termination of the lease; 3) the tenant timely moved for injunctive relief prior to the expiration of the cure period and termination of the lease, and 4) the tenant has the desire and ability to cure its alleged default by any means short of vacating the premises. **Mayfair Super Markets Inc v Serota**, 262 AD 2d 461, 692 NYS 2d 415 (2d Dep't 1999).

In this case, Plaintiff has demonstrated that it fulfills all the necessary criteria, since, it is a tenant under a commercial lease; it has received from Defendant, landlord, a Notice of Default; Plaintiff has moved for temporary relief prior to termination; and Plaintiff has stated in the Kolman Affidavit (para. 15) that it has the ability to cure an alleged default rather than vacate the premises.

### **SERVICE OF ORDER TO SHOW CAUSE**

**CPLR § 311** provides, in pertinent part that: “(a) Personal service upon a corporation . . . Shall be made by delivering the summons as follows: 1. Upon any domestic or foreign corporation, to an officer, director . . . or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six . . . of the business corporation law.

**BCL § 304** provides, in pertinent part that : “(a) The secretary of state shall be the agent of every domestic corporation and every authorized foreign corporation upon whom process against the corporation may be served.”

**BCL § 306** provides, in pertinent part that : “(b)(1) Service of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by delivering to and leaving with the secretary of state . . . at the office of the department of state in the city

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of Albany, duplicate copies of such process together with the statutory fee . . . . Service of process on such corporation shall be complete when the secretary of state is so served.”


The Affidavits of Service by Plaintiff’s process server demonstrate service of this motion and the papers upon which it is based on both the President of the Defendant corporation and upon the Secretary of State. Defendant’s president denies having been served, stating that he was out of state at the time of the presumed service; however, Defendant does not contest that service was made on the Secretary of State. Rather, Defendant argues that such service was ineffectual since the Order to Show Cause and supporting motion papers did not constitute “process”; i.e., papers by which a court acquires jurisdiction over a corporation.

However, Defendant ignores the fact that one of purposes of an Order to Show Cause is to allow the Court to set forth the manner of service of a motion,. This Court did so when it specifically authorized service under CPLR § 311. As set forth by Professor Siegel, “(t)he order to show cause is presented to the court ex parte. It has these advantages: . . .The court determines whom to serve with the order.” (**New York Practice**, 4<sup>th</sup> ed). In so doing, this Court authorized service of motion papers under any manner set forth under CPLR § 311, which include service upon a designated agent under BCL § 304. Taking Defendant’s argument to its logical extreme would mean that no service could be effectuated on a corporation under CPLR § 311 since the statute itself only refers to the service of a “summons”. There is nothing in the Order to Show Cause limiting the Plaintiff. Accordingly, service was effectuated, by operation of law when the Secretary of State was served, as per the process server’s Affidavit annexed to Plaintiff’s motion papers.

Accordingly, for all the reasons set forth herein, the Plaintiff’s motion for a Yellowstone injunction prohibiting the Defendant and all persons acting on its behalf from taking any steps to terminate, cancel or interfere with Plaintiff’s leasehold interest in the real property located at 64 County Road 39, Southampton New York, pending determination the Fourth cause of action in the lease, is granted.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: July 10, 2008  
Riverhead, New York

  
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EMILY PINES  
J. S. C.