

**Portraitbug, Inc. v 215 W. 91st St., LLC**

2009 NY Slip Op 30501(U)

March 5, 2009

Supreme Court, New York County

Docket Number: 116276/08

Judge: Paul G. Feinman

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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**  
**PRESENT: HON. PAUL GEORGE FEINMAN PART 12**

*Justice*

Portrait bug, Inc.

- v -

215 W. 91<sup>st</sup> St.

INDEX NO. 116276/08  
 MOTION DATE 1/14/09  
 MOTION SEQ. NO. 001  
 MOTION CAL. NO. 16

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Yellowstone.

Notice of Motion/Petition — Affidavits — Exhibits \_\_\_\_\_  
 Answering Affidavits — Exhibits (Memo) \_\_\_\_\_  
 Notice of Cross-Motion — Affidavits — Exhibits \_\_\_\_\_  
 Replying Affidavits (Reply Memo) \_\_\_\_\_

**PAPERS NUMBERED**  
1  
*see attached*

**Cross-Motion:**  Yes  No

Upon the foregoing papers, it is ORDERED that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
 THE ANNEXED DECISION AND ORDER.**

**FILED**  
 MAR 09 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Dated: 3/5/09

[Signature]  
 J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 DO NOT POST  REFERENCE  
 Preliminary <sup>settlement</sup> Conference 4/1/09 11AM  
 Compliance Conference \_\_\_\_\_

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X  
PORTRAITBUG, INC.,

Plaintiff,

against

215 WEST 91<sup>ST</sup> STREET, LLC,

Defendant.  
-----X

Index Number 116276/2008

Mot. Submit Date Jan. 14, 2009

Mot. Seq. No. 001

Cal. No. 16

**DECISION AND ORDER**

**For the Plaintiff:**

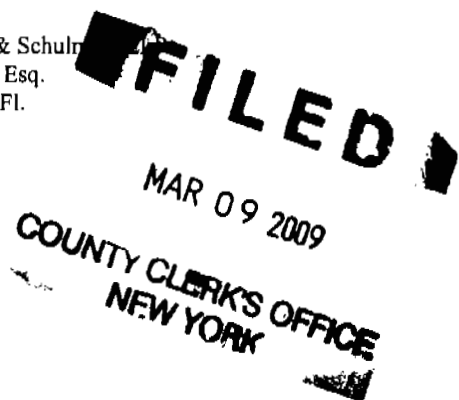
Hubell & Associates, LLC  
By: Richard A. Hubell, Esq.  
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**For the Defendant:**

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New York NY 10017  
(212) 832-4000

Papers considered in review of this motion for a preliminary injunction:

Papers	Numbered
Order to Show Cause, Memo of Law	1, 1A
Affidavit in Opposition, & Memo of Law	2, 4
Answer	3
Reply Affidavit, Memo of Law, Supp. Reply	5, 6, 7



**PAUL G. FEINMAN, J.:**

Plaintiff, a commercial tenant in defendant's building, moves by order to show cause for a *Yellowstone* injunction staying its time to cure the lease violation set forth in the Notice to Cure dated November 26, 2008 and restraining defendant and its agents from terminating its lease or commencing a summary eviction proceeding based on the Notice of Termination dated December 3, 2008. Alternatively, plaintiff seeks an Article 63 preliminary injunction. Plaintiff also seek an order affirmatively directing defendant to immediately restore the premises to the specifications and dimensions set forth in the lease diagram and an award of attorney's fees, costs and disbursements. For the reasons which follow, the motion is granted in part.

*Factual and Procedural Background*

The parties entered a 10-year commercial lease agreement on May 30, 2008 (Mot. Ex. 2). The lease concerned 1,577 rentable square feet on the first floor of defendant's building, with the first year's monthly base rent to be \$15,000, although there was to be no base rent payments for June, July, August, September, and October of 2008, and February and March 2009 (Mot. Ex. 2, Lease ¶ 40, p. 10).<sup>1</sup> The lease provided that the landlord would among other things build at its expense a demising wall between plaintiff's store and a smaller store to the north, and install a sub-meter for electrical use (Lease p. 41 [A]). It also provided that if the landlord was unable to give possession to the tenant or to provide 140 amps of electricity, the owner is not to be subject to any liability and the lease's validity is not at issue, but the tenant is entitled to a credit of one day of base annual rent for each day the premises was not available or the electricity was not within the premises (Mot. Ex. 2, Lease ¶ 23). Plaintiff alleges that between August 14 and October 25, 2008, there was no electrical service while certain repairs were being made (Mot. Goldenberg Aff. ¶¶ 12-13). Plaintiff further alleges that the demising wall was not completed under October 25, 2008; it "repeatedly" notified landlord in writing of the delay and that it had been constructively evicted from June 1, 2008 through October 25, 2008, and now seeks a rent concession of one day for each of the 146 days it was evicted (Mot. Goldenberg Aff. 14-16). In addition, it alleges that defendant informed plaintiff that the demising wall would be built so as to provide an even 500 square feet to the tenant of the northern store, reducing plaintiff's front selling area by 60 square feet, in effect eliminating approximately 17% of the primary first floor

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<sup>1</sup>Plaintiff's vice president, Robert Goldenberg, states that when the lease was signed, plaintiff paid \$85,000, representing three months' security and the first two months' rent, paid to the landlord's broker as a "brokerage fee." (Mot. Goldenberg Aff. ¶ 6 and n. 1).

selling area.<sup>2</sup> Plaintiff seeks injunctive relief to prevent defendant from commencing a summary proceeding and evicting it from the premises, and an injunction requiring the landlord to demolish the wall and build it according to the lease agreement.

Defendant served a notice on November 26, 2008 claiming that plaintiff failed to pay the November base monthly rent (Mot. Ex. 9). On December 4, 2008, defendant served a notice stating that plaintiff had failed to cure the default and that the lease would end in three days (Mot. Ex. 10). Plaintiff brought this order to show cause on December 5, 2008 seeking a *Yellowstone* injunction.

Defendant alleges that at the time the motion was filed, plaintiff had allegedly not paid the November or December base rent and late charges (Kaye Aff. in Opp. ¶ 4). Plaintiff argues that under the lease no rent was due because there was a partial eviction (Goldenberg Reply Aff. ¶ 6). Defendant argues that plaintiff violated the lease agreement by performing work other than decorative work including taking down part of the ceiling, and not hiring a general contractor qualified to do non-decorative work (Kaye Aff. in Opp. ¶ 6). Plaintiff alleges that its work plans were submitted to defendant who signed off on them and submitted them to the Department of Buildings, and that its general contractor gave defendant insurance certificates (Goldenberg Reply Aff. ¶ 7). Defendant alleges that plaintiff was operating its business and receiving customers in the store and should therefore be accountable for the rent (Kaye Aff. in Opp. ¶ 8). Plaintiff states it only opened for business on November 25, 2008, and that the previous lack of electricity interfered with its ability to ready the premises for business, as no power tools could

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<sup>2</sup>This equates, plaintiff asserts, with a loss of \$78,413 in rent paid over the course of the lease (Mot. Goldenberg Aff. ¶¶ 18-21 and n. 2).

be used (Goldenberg Reply Aff. ¶ 8). It states it repeatedly complained to defendant. Plaintiff also alleges, although only in a supplemental reply containing the hearsay statement of an electrician and photocopies of photographs, that defendant has failed to comply with the portion of the lease agreement to install a sub-meter for electrical use by the two stores (Goldenberg Supp. Reply Aff. ¶¶ 2-4). Under paragraph 41 (C) of the lease, when the owner causes a delay, the tenant is not obligated to pay the rent, as long as the tenant notifies the owner and provides proof that it was not the tenant's fault.

Defendant does not dispute that the wall reduced the space available to plaintiff, but contends that the reduction in space is de minimus (Answer ¶ 12). It contends that plaintiff had the entire premises available to plan and decorate during the building of the wall (Def. Memo of Law ¶ 4). It also argues its revision provided plaintiff with a rectangular space for a more typical display of goods rather than the "disoriented" space with four separate indentations (Def. Memo of Law ¶ 3). Plaintiff argues that it had "big plans" to use the lost space for its viewing photo systems along with display fixtures for high volume merchandise (Goldenerg Aff. ¶ 9).

As concerns the electricity in the store from June through October, defendant alleges that plaintiff had "150 amps, three phase," from the date of the lease, and that it "may or may not be correct" that the contractor was unable to work for 20 days (Def. Memo of Law ¶ 5).

The parties appeared on January 14, 2009 for oral argument. By interim decision and order of that date, the court continued the previously issued temporary restraining order on the condition that plaintiff paid the January "U&O" (use and occupancy) in the amount of \$15,000 on or before January 20, 2009, and noted that under the lease's terms, no rent or U&O, is due in February and March 2009.

### *Legal Analysis*

In commercial landlord-tenant disputes, a *Yellowstone* injunction maintains the status quo in order to permit the tenant faced with the imminent termination of its lease the ability to protect its leasehold by obtaining a stay that tolls the cure period; if there is an adverse determination on the merits of the dispute, the tenant can cure the default and avoid a forfeiture of the leasehold (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]). Its purpose is to stop the running of the cure period and to maintain the status quo while the underlying dispute is litigated (*E.C. Elec., Inc. v Amblunthorp Holding, Inc.*, 38 AD3d 401, 401 [1<sup>st</sup> Dept. 2007], citing *Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508 [1999]; *First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968]). The showing required for a *Yellowstone* injunction is somewhat “more relaxed” than when applying for a preliminary injunction, and a toll of the period to cure is inherent in the relief sought. (*E.C. Elec., Inc.*, at 402, citing *Garland v Titan W. Assoc.*, 147 AD2d 304, 307 [1989]). The party requesting a *Yellowstone* injunction must demonstrate that it holds a commercial lease; it received a notice of default, or to cure, or a threat of termination of the lease from the landlord; it sought injunctive relief prior to the lease termination; and is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises (*Graubard Mollen*, at 514, quotation and citation omitted). Plaintiff satisfies these conditions, including by the statement of its vice-president that he is ready, willing, and able to cure the default if it is determined it is in default (Mot. Goldenberg Aff. ¶¶ 28-29).

The general rule is that an unauthorized taking suspends the obligation to pay rent (*Eastside Exhibition Corp. v 210 E. 86<sup>th</sup> St. Corp.*, 23 AD3d 100, 103 [1<sup>st</sup> Dept. 2005]). It is an

actual eviction and results in the total abatement of rent (*Id.* 104). However, where the taking is found to be de minimus, the court may fashion a remedy that compensates the tenant with money damages proportionate to the injury involved (*Id.* at 104-105, citing *Paine v Chriscott v Blair House Assoc.*, 70 AD2d 571 [1<sup>st</sup> Dept. 1979] ; *Appliance Giant, Inc. v Columbia 99 Assoc. LLC*, 8 AD3d 932 [3d Dept. 2004]; *81 Franklin Co. v Ginaccini*, 160 AD2d 558 [ 1990])).

Here, it is undisputed that plaintiff did not pay the rent for November or December. However, there also is no dispute that defendant reduced the square footage of space plaintiff leased for its store, and that there was some period of construction slowdown, including some days where there apparently was no electrical power. While a plaintiff's burden for obtaining *Yellowstone* relief is more "relaxed" than when seeking Article 63 preliminary injunctive relief, it bears noting that here plaintiff demonstrates a strong likelihood of success in establishing that defendant breached the lease by taking some of the square footage which would result at the very least, in a rent abatement. Furthermore, plaintiff is likely to show that it is due a rent abatement of some amount, but not necessarily equal to the entire 140 days given that the parties agreed that defendant would build a wall and install a sub-meter after the tenancy commenced.. Without the *Yellowstone* injunction in place, it would face the likelihood of eviction, an irreparable injury. Although the payment of rent is certainly a fundamental lease provision, the balance of equities weighs in plaintiff's favor, given the short period of time this lease has been in effect and that several months were rent free according to the lease.

Accordingly, the branch of plaintiff's motion seeking *Yellowstone* relief tolling Portraitbug's time to cure the lease violations identified in the November 26, 2008 Notice to Cure is granted and the defendant is enjoined from terminating plaintiff's lease based on this

lease violation. In light of the foregoing, the court need not address the request for an Article 63 preliminary injunction.

The branch of the motion seeking affirmative injunctive relief in the form of an order directing defendant to restore the premises to the specifications and dimensions set forth in the lease diagram, and for attorney's fees, is denied as premature. These issues must await a final resolution of the dispute.

Although the defendant opposes the motion for *Yellowstone* relief, it does not argue in the alternative that the court should require an undertaking in the event such relief were to be granted. Thus, absent such a request from the defendant and input from the parties, the Court declines to reach the issue *sua sponte*, because the Court could not fix the amount of such undertaking without resort to sheer speculation as to the potential damages should it turn out this *Yellowstone* relief was improvidently granted. Accordingly, it is

ORDERED that the motion by plaintiff for a *Yellowstone* injunction is granted; and it is further

ORDERED that, until further order of this court, 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 taking any action to cancel or terminate plaintiff's lease based on the November 26, 2008 Notice to Cure, for the premises located at 2466 Broadway, New York, New York; and it is further

ORDERED that the branch of the motion seeking an order directing defendant to restore the premises to the specifications and dimensions set forth in the lease diagram, and for attorney's fees, is denied as premature; and it is further

ORDERED that the parties are to appear for their previously scheduled preliminary conference and settlement conference on April 1, 2009, in room 212 of Supreme Court, 60 Centre Street, at 11:00 a.m. at which time the court will also consider the issue of "use and occupancy" payments for April 2009 and thereafter.

This constitutes the decision and order of the court.

Dated: March 5, 2009  
New York, New York



\_\_\_\_\_  
J.S.C.

