

Rice v Adams & Miller

2009 NY Slip Op 31002(U)

April 30, 2009

Supreme Court, New York County

Docket Number: 100007-2009

Judge: Carol R. Edmead

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

PRESENT: CAROL EDMEAD
J.S.C.

PART 35

Justice

Jonathan Rice

FILED

INDEX NO. 100007-09

MOTION DATE 2/23/09

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

Adams & Miller

MAY 11 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the order to show cause for an order granting a Yellowstone injunction staying and enjoining defendant and its attorneys from taking any other measures or actions to enforce plaintiff's alleged defaults of his tenancy in Unit 12 Front at 247 West 35th Street, New York, New York, including, without limitation, commencing any summary proceeding or action to take possession of, or otherwise affect the tenancy of plaintiff in the demised premises, pending the determination of this action is granted; and it is further

ORDERED that the Court does not reach the branch of the order to show cause for an order granting a injunction staying and enjoining pursuant to, without limitation, CPLR Sections 6301 and 6311; and it is further


ORDERED that the branch of the order to show cause for an order granting plaintiff a reasonable opportunity to cure any default(s), if plaintiff is found to be in default, at the conclusion of this action, is granted; and it is further

ORDERED that the parties shall appear for a preliminary conference on June 9, 2009, 2:15 p.m.; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitute the decision and order of the Court.

Dated: 4/30/09


CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 35

-----x
JONATHAN RICE, ATTORNEY-AT-LAW,

Plaintiff,

-against-

ADAMS & MILLER,

Defendant.
-----x

HON. CAROL ROBINSON EDMEAD, J.S.C.

Index No. 100007-2009
Motion Sequence 001

DECISION/ORDER

FILED
MAY - 11 2009
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Plaintiff, moves for an order (a) granting a Yellowstone injunction pursuant to, without limitation, CPLR Sections 6301 and 6311, and/or (b) staying and enjoining defendant and its attorneys from taking any other measures or actions to enforce plaintiff's alleged defaults of his tenancy in Unit 12 Front at 247 West 35th Street, New York, New York (the "demised premises"), including, without limitation, commencing any summary proceeding or action to take possession of, or otherwise affect the tenancy of plaintiff in the demised premises, pending the determination of this action; and (c) granting plaintiff a reasonable opportunity to cure any default(s), if plaintiff is found to be in default, at the conclusion of this action.

Order to Show Cause

Plaintiff Jonathan Rice, Attorney-at-Law ("plaintiff") contends that he was served with a Notice to Cure which expires on January 5, 2009 concerning the premises located at 12 Front at 247 West 35th Street, New York, New York (the "Notice to Cure"). Plaintiff maintains his law office at the premises pursuant to a commercial lease. The Notice to Cure alleges that plaintiff breached the lease by subletting the premises without its consent and that he is willing to cure

any lease default found by this Court to exist, rather than forfeit his tenancy. Plaintiff contends that defendant is not entitled to all of the money claimed owed by plaintiff. Yet, plaintiff agrees to pay any money that may be due to defendant, and remove the subtenants if the Court so requires. Plaintiff also contends that his application is made before the expiration of the lease. Thus, argues plaintiff, the *status quo* should be preserved until this Court can determine whether or not plaintiff is in breach of his lease.

Paragraph 45 of the lease permits plaintiff to sublease "for a legal professional or office use" provided that he obtain the landlord's written consent, "which consent shall not be unreasonably withheld." In May 2008 and June 2008, plaintiff sent two letter applications advising defendant of its intent to sublet the premises for two subtenants, William Wes Herzik, DBA Ikonik, LLC ("Ikonik") (the "May 2008" letter) and Steven Kunstler, DBA Key Communications ("Key Communications") (the "June 2008 letter"), respectively. These subtenants have compatible office businesses there: Ikonik is a computer consulting company, and Key Communications is a telephone systems consulting company. Plaintiff waited a reasonable amount of time after these applications were sent to the landlord, and when he heard nothing, the subtenants moved in. Plaintiff never received any response whatever to these applications. Plaintiff's subtenants have been about the building for several months each. Their presence is obvious, as conceded by the Notice to Cure. During that time, rent has been paid and accepted by defendant with knowledge of the subtenants. Plaintiff argues that defendant waived the right to object to the subtenants.

Immediately before receiving the Notice to Cure, plaintiff applied to the defendant for a third subtenant, an attorney. On or about December 23, 2008, plaintiff received correspondence

from defendant rejecting this third sublet application. The landlord's letter incorrectly suggests that plaintiff installed previous subtenants without asking for consent and incorrectly calculates the monies claims as owed.

Pursuant to an amendment to the lease, paragraph 7, defendant waived the collection of any money from plaintiff for the period prior to April 2006, except the payments enumerated in the lease amendment. The December 23 letter also purports to deny permission for subletting, among other things, because plaintiff did not pay sprinkler charges for the period July 2005 through April 2006 at \$100 per month, which were waived by the lease amendment.

In any event, the lease does not require plaintiff to be in strict conformity with each and every provision of my lease, in order to receive permission to sublease, and plaintiff is in substantial compliance with the lease.

Plaintiff spent \$100,000 on improvements to the demised premises which will revert to the landlord and could be used by any upscale office tenant if the tenancy is terminated. The lease continues until 2015, and if the lease is terminated, plaintiff's improvements become the landlord's property. It is also important that a law firm have a stable address so that clients and other lawyers know where to find plaintiff. Defendant seeks to terminate the tenancy because "there is bad feeling over a dispute that occurred at the time of lease execution, and because defendant can then profit by a more lucrative lease on the space."

Opposition

With regard to plaintiff's right to sublet, Paragraphs 45 and 54 state as follows:

45. Tenant shall have the right to sublet or assign to any person for a legal professional or office use provided Tenant remains liable under the Lease. Tenant may not sublet or assign demised premises without written consent of Landlord,

which consent shall not be unreasonably withheld, subject to Paragraph # 54.

54. Leaseback by Owner

A. (1) If Tenant shall desire to assign this lease or to sublet all or any portion of the Demised Premises to anyone other than a related or successor corporation, Tenant's, notice shall be deemed an offer from Tenant to Owner whereby Owner (or Owner's designee) may, at its option (I) sublease such space (the "Leaseback Space from Tenant upon the terms and conditions hereinafter set forth Said options may be exercised by Owner by notice to Tenant at any time within sixty (60) days after receipt of Tenant's notice to Owner; and during such sixty (60) day period Tenant shall not assign' this Lease nor sublet such space to any person.

The sublease language set forth above was a bargained for lease term. In spite of the plain meaning of the language, plaintiff disregarded the Lease terms and conditions and, in fact admitted as much in its papers. Defendant contends that it never received the May 2008 or June 2008 letters. Notwithstanding the plaintiff's failure to request a right to sublet, thereafter, without waiting the required 60 days for defendant's written consent, plaintiff sublet portions of the premises.

Defendant has the obligation to maintain some control over the occupants of the Building to insure not only public safety but to insure as high a standard as possible over the quality of Building occupants. Plaintiff violated the Lease sublet clause by subletting without defendant's written consent, by subletting to other than a related-or-successor corporation, and by depriving defendant of the Leaseback option

Analysis

The purpose of the *Yellowstone* injunction is to maintain the *status quo* so that a commercial tenant may protect its valuable property interest in its lease while challenging the landlord's assessment of its rights (*see Lexington Ave. & 42nd Street Corp. v 380 Lexchamp Operating, Inc.*, 205 AD2d 421 [1st Dept 1994], *citing Post v 120 E. End Ave. Corp.*, 62 NY2d

19, 26 [1984]). A *Yellowstone* injunction forestalls the cancellation of a lease to afford the tenant an opportunity to obtain a judicial determination of its breach, the measures necessary to cure it, and those required to bring the tenant in future compliance with the terms of the lease (see *Waldbaum, Inc. v Fifth Ave. of Long Is. Realty Assocs.*, 85 NY2d 600, 606 [1995]).

In order to obtain a *Yellowstone* injunction, the tenant must demonstrate (1) the existence of a commercial lease; (2) receipt from the landlord of a notice of default thereunder, a notice to cure such default, or a threat of termination of the lease; (3) application for the issuance of an injunction, made prior to the lease's termination; and (4) the tenant's ability and desire to cure the alleged default, by any means short of vacating the premises (*New Eagle Inc. v H.R. Neumann Assoc., Inc.* 2004 N.Y. Slip Op. 50724(U); *Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225 [1st Dept 1997]; *Marathon Outdoor, LLC. v Patent Const. Sys. Div. of Harsco Corp.*, 306 AD2d 254 [2d Dept 2003]; *WPA/Partners LLC. v Port Imperial Ferry Corp.*, 307 AD2d 234 [1st Dept 2003], citing *Herzfeld & Stern, supra*). A tenant seeking a *Yellowstone* injunction must convince the court "of his desire and ability to cure the defects by any means short of vacating the premises" (*Cemco Rest., Inc. v Ten Park Ave. Tenants Corp.*, 135 AD2d 461 [1st Dept 1987]; *Jemaltown of 125th St., Inc. v Leon Betesh/Park Seen Realty Assoc.*, 115 AD2d 381, 382 [1st Dept 1985]).

The record establishes that petitioner served a Notice to Cure, dated December 16, 2008, in connection with his commercial lease of the premises. Plaintiff timely sought *Yellowstone* relief on January 2, 2009, before the termination date set forth by defendant, January 5, 2009. The Notice to Cure alleges that petitioner violated paragraphs 11 and 45 of the lease, in that petitioner "assigned or sublet" the premises without defendant's written consent. To demonstrate

petitioner's willingness and ability to cure the alleged default, petitioner states that he is willing to remove the subtenants (and pay any fees owed). Based on the foregoing, petitioner has established his entitlement to *Yellowstone* relief, and the order to show cause for a stay enjoining defendant and its attorneys from taking any other measures or actions to enforce plaintiff's alleged defaults of his tenancy, including, without limitation, commencing any summary proceeding or action to take possession of, or otherwise affect the tenancy of plaintiff in the demised premises, is granted, pending the determination of this action.

In light of the petitioner's entitlement to *Yellowstone* injunctive relief, the Court does not reach the issue of whether injunctive relief is warranted under CPLR 6301 and 6311.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the order to show cause for an order granting a *Yellowstone* injunction staying and enjoining defendant and its attorneys from taking any other measures or actions to enforce plaintiff's alleged defaults of his tenancy in Unit 12 Front at 247 West 35th Street, New York, New York, including, without limitation, commencing any summary proceeding or action to take possession of, or otherwise affect the tenancy of plaintiff in the demised premises, pending the determination of this action is granted; and it is further

ORDERED that the Court does not reach the branch of the order to show cause for an order granting a injunction staying and enjoining pursuant to, without limitation, CPLR Sections 6301 and 6311; and it is further

ORDERED that the branch of the order to show cause for an order granting plaintiff a reasonable opportunity to cure any default(s), if plaintiff is found to be in default, at the

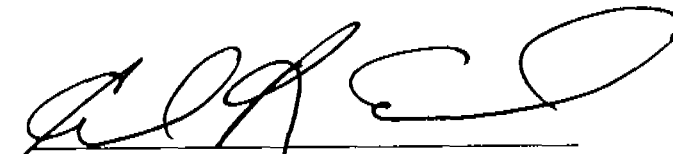
conclusion of this action, is granted; and it is further

ORDERED that the parties shall appear for a preliminary conference on June 9, 2009, 2:15 p.m.; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant within 20 days of entry.

This constitute the decision and order of the Court.

Dated: April 30, 2009



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDM EAD

FILED

**MAY 31 2009
NEW YORK
COUNTY CLERK'S OFFICE**