

**Quality Impressions Print Finishing, Inc. v Lorel 163
Varick, LLC**

2009 NY Slip Op 31762(U)

August 4, 2009

Supreme Court, New York County

Docket Number: 106017/09

Judge: Joan A. Madden

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8-6-09
E-09

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

PRESENT: MADDEN
Justice

PART 11

QUALITY IMPRESSIONS PRINT FINISHING, INC.

INDEX NO. 106017/09

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

LORREL 163 VARICK, LLC

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 is determined in accordance with the annexed decision and order.

FILED
AUG 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: August 4, 2009 _____ 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 11

-----X

QUALITY IMPRESSIONS PRINT FINISHING, INC.,

Plaintiff,

-against-

LOREL 163 VARICK, LLC,

Defendant.

-----X

INDEX NO. 100017/09
FILED
AUG 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

JOAN A. MADDEN, J.:

In this action involving a dispute between a commercial tenant and landlord, plaintiff tenant is moving by order to show cause for a Yellowstone injunction: 1) staying and tolling the May 1, 2009 deadline to cure the alleged lease violations set forth in defendant's Amended Notice to Cure dated March 27, 2009¹; and 2) enjoining and restraining defendant from commencing any action or proceeding to evict or eject plaintiff from the subject premises or to terminate plaintiff's lease, and from taking any action to interfere with plaintiff's possession of the premises. Defendant landlord opposes the motion.

The purpose of a Yellowstone injunction is to "maintain the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse

¹Defendant served a prior Notice to Cure dated February 6, 2009, which was presumably superceded by the March 27, 2009 Amended Notice to Cure.

determination on the merits, the tenant may cure the default and avoid a forfeiture.” Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Assocs., 93 NY2d 508, 514 (1999). “As such, it may be granted on less than the normal showing required for preliminary injunctive relief.” Lexington Avenue & 42nd St. Corp. v. 380 Lexchamp Operating, Inc., 205 AD2d 421, 423 (1st Dept. 1994). In order to obtain a Yellowstone injunction, a tenant must demonstrate that: 1) it holds a commercial lease; 2) it received from the landlord a notice to cure, a notice of default, or a threat that the lease would be terminated; 3) it requested injunctive relief prior to the expiration of the cure period and 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. See Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Assoc., *supra*.

Plaintiff has made a sufficient showing for Yellowstone relief. It undisputed that plaintiff, a print finishing company, holds a commercial lease for the entire third floor of the building located at 163 Varick Street in Manhattan. It is also not disputed that plaintiff received an Amended Notice to Cure dated March 27, 2009, stating that it was in breach of the lease provisions requiring the landlord’s prior written consent to any subletting of the premises. The Amended Notice to Cure asserts that “Edwin Shiraz, an agent for the Landlord spoke with Vernon Ganga, the president of Quality Impressions, Inc., who acknowledged that the Tenant sublet portions of the subject premises to Subtenants” and that the “Tenant never obtained the prior written consent of the Landlord or the predecessor Landlord.” The notice states that “the Tenant entered into a Sublease Agreement dated April 5, 2005 with Litho Partners Digital, Inc. renting . . . approximately 2,125 rentable square feet to Litho Partners Digital Inc. for a term of

five (5) years,” and that such “sublease was never agreed to in writing by the Landlord or the Predecessor Landlord.” The notice further states that the tenant “subleased other portions of the subject premises to other subtenants whose names are unknown to the Landlord without the prior written consent of the Landlord.”

By the instant order to show cause, plaintiff made a timely application for Yellowstone relief prior to the expiration of the cure period. The Notice to Cure states that plaintiff is required to cure the alleged lease violations “on or before May 1, 2009,” and plaintiff secured the instant order to show cause prior to that date on April 30, 2009. Plaintiff has also established its willingness and ability to cure the alleged lease violations, by submitting a sworn statement from its president, Vernon Ganga, that in the event plaintiff is found to be in breach of the lease, it “remains ready, willing and able to cure any alleged breach, short of vacating the Subject Premises.” Plaintiff also submits an affidavit from Michael O’Connor, the president of the prior owner of the building, Colonial Hardware Corporation,² stating that he “orally consented to the sublet from Quality Impressions Inc. to Litho Partners Digital, Inc.”

In opposing the motion, defendant addressed the likelihood of plaintiff’s success on the merits of the underlying dispute as to whether the subletting breaches the lease. However, the law is clear that a Yellowstone injunction “may be granted on less than the normal showing required for preliminary injunctive relief.” Lexington Avenue & 42nd St. Corp. v. 380 Lexchamp Operating, Inc., supra at 423. Moreover, a tenant is not required to prove its ability to cure prior

²The parties agree that by a deed dated November 15, 2007, title to the building was transferred from the prior owner, Colonial Hardware Corp. to the current owner, defendant Lorel 163 Varick, LLC.

to obtaining a Yellowstone injunction, as “[t]he proper inquiry is whether a basis exists for believing that the tenant desires to cure and has the ability to do so through any means short of vacating the premises.” WPA Partners LLC v. Port Imperial Ferry Corp., 307 AD2d 234, 347 (1st Dept 2003). Defendant’s further assertion that this matter should be heard in Housing Court is likewise without merit, as Housing Court lacks the authority to issue the injunctive relief plaintiff seeks to stay and toll the effect of the Amended Notice to Cure.

Based on the foregoing, plaintiff is entitled to a Yellowstone injunction so as to maintain the status quo and afford it an opportunity to cure should it be found in default of its lease obligations. See Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Assoc., supra. In accordance with the court’s prior order, plaintiff shall continue paying defendant use and occupancy/rent in the amount of rent called for in lease.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for a Yellowstone injunction is granted and the expiration of the period for plaintiff to cure any alleged defaults pursuant to defendant’s Amended Notice of Cure dated Mach 27, 2009 is stayed and tolled, and defendant is enjoined from taking any steps to terminate plaintiff’s lease, and from commencing any action or summary proceeding seeking to evict or eject plaintiff based upon the March 27, 2009 Amended Notice to Cure, and from taking any action to interfere with plaintiff’s possession of the premises; and it is further

ORDERED that if defendant has not already done so, it shall serve and file an answer within 20 days of the date of this decision and order;

ORDERED that plaintiff shall continue to pay defendant use and occupancy/rent in the

amount provided for as rent in the lease; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on September 17, 2009 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

The court is notifying the parties by mailing copies of this decision and order.

DATED: August 4, 2009

ENTER:



J.S.C.

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COUNTY CLERK'S OFFICE
NEW YORK