

**Excel Assoc. v Excelsior 57th Corp.**

2009 NY Slip Op 31934(U)

August 26, 2009

Supreme Court, New York County

Docket Number: 108755/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Justice

EXCELL ASSOC  
Plaintiff (s),

INDEX NO.

108755/09

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

- v -  
EXCELSIOR 57<sup>th</sup>  
Defendant(s)

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

**FILED**  
AUG 27 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

and PC scheduled for  
OCTOBER 1, 2009 @ 9:30 am in  
Part 10

Dated:

August 26, 2009

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**

-----X  
Excel Associates,  
  
Plaintiff,  
  
-against-

**DECISION AND ORDER**  
Index #: 108755/09  
Mot. Seq. #: 001

Present:  
Hon. Judith J. Gische

Excelsior 57<sup>th</sup> Corp.,  
  
Defendant.  
-----X

Recitation, as required by CPLR 2219[a], of the papers considered in the review of this (these) motion(s):

**Papers**

|                                    |   |
|------------------------------------|---|
| OSC, GT affd, exhibits.....        | 1 |
| AR affd. in Opp., exhibits.....    | 2 |
| RJG affirm. in Reply, EA affd..... | 3 |

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AUG 27 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

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

Defendant is a cooperative apartment corporation that owns the building at 301-303 East 57<sup>th</sup> Street, New York, New York ("building"). Pursuant to a written lease, plaintiff is the commercial tenant of the first five floors and the parking garage in the building. Plaintiff, in turn, subleases its space to others, which insofar as pertinent here, includes Megafit Corporation ("Megafit"). The space leased to Megafit contains a swimming pool. In June 2008 the swimming pool developed severe leaks and it has not been operational since then.

On or about May 29, 2009 defendant served a Notice to Cure on plaintiff. The Notice to Cure states two purported defaults under the parties' written lease. One default concerns the failure to operate a swimming pool at the building. The second default concerns the failure to provide statements of rent calculations and the payment of additional rent in accordance with such statements. The Notice to Cure expressly

states that the plaintiff has until June 23, 2009 to cure such defaults, otherwise the defendant will take action to terminate the lease.

Plaintiff has commenced an action for a declaration of rights under the parties' lease and simultaneously moves for a Yellowstone injunction to toll the cure period pending the outcome of the underlying action. On June 22, 2009 this court signed an Order to Show Cause containing a Temporary Restraining Order ("TRO") tolling the expiration of the Notice to Cure. That TRO was extended by the court on July 2, 2009 to continue pending determination of this underlying motion.

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, after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold. First Natl. Stores v. Yellowstone Shopping Ctr., 21 NY2d 630 (1968); Long Island Gynecological Srvs. 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).

Plaintiff claims that under the parties' lease it has a *bona fide* dispute about whether it or the defendant is responsible for fixing the swimming pool. Plaintiff claims that the problems with the swimming pool are structural, which are defendant's obligation to repair. Plaintiff also claims other defenses, including the acceptance of rent and defects in the Notice to Cure. Plaintiff further claims that in the event that its legal positions are not

accepted by the court, it is willing to and has the financial wherewithal to fix the swimming pool.

With respect to the calculation of and payment of additional rent, plaintiff claims in its initial moving papers that its accountants are well underway with making the requisite calculations and that it will make the additional rent payments required as a result of those calculations shortly. In the reply papers, plaintiff claims that the calculations were made and the payments were paid by it and accepted by defendant. Defendant does not dispute that the payment plaintiff made cures the second prong of the Notice to Cure.

Defendant, however, generally opposes this application for a Yellowstone injunction. It argues that the application for Yellowstone relief was not timely brought. It further claims that plaintiff has not shown its ability or willingness to cure the swimming pool situation. It also argues that defendant does not have a bona fide claim, that it is not responsible to pay for the repairs to the swimming pool, based on what it believes to be an inconsistent position taken by plaintiff in an action with its subtenant, Metrofit. Finally, it argues that any Yellowstone injunction should be conditioned upon plaintiff paying all the outstanding rent due, and that a \$1,000,000 bond should be posted as a condition to obtaining the injunction.

With respect to the four requirements to obtaining a Yellowstone injunction, there is no dispute that plaintiff has satisfied the first two. It holds a commercial lease and it received a Notice to Cure, threatening termination of the lease.

The court rejects defendant's contention, that the parties in this action do not have a *bona fide* dispute about who is responsible to make the pool repairs. The lease provides that defendant shall make all structural repairs, whether foreseen or unforeseen, provided they were not caused by the negligence of the plaintiff. There is a factual dispute about

whether the leaking conditions in the swimming pool are structural or not and how they were caused. Defendant's argument that there is no *bona fide* dispute is based upon separate New York State Supreme Court litigation that is ongoing between plaintiff and its own tenant, Megafit Corporation (NY Co. index # 117229/09) ("Megafit action"). In the Megafit action the plaintiff and its subtenant entered into an interim stipulation that plaintiff would undertake making the necessary repairs to the swimming pool. Defendant argues that this stipulation is an admission by plaintiff that it is legally responsible to make such repairs. Such stipulation, however, was expressly made without prejudice to the rights, claims or remedies of the parties in that action. Thus, it is not an admission of anything. In any event, the defendant is not a party to the Megafit action, consequently whatever rights may be established against plaintiff vis a vis Megafit under the sublease, are not necessarily the same rights as between the plaintiff and defendant herein.

The court further rejects defendant's argument that the TRO was not obtained before the cure period expired. In general, a Yellowstone injunction is only available when it is sought before the expiration of a cure period. Prince Fashions, Inc. v. 542 Holding Corp, 15 AD3d 214 (1<sup>st</sup> dept. 2005). Defendant's argument is based upon a calculation of the cure period provided for in the lease from the time defendant originally served the Notice to Cure on plaintiff. The Notice to Cure itself, however, sets June 23, 2009 as the date within which a cure may be effected. The defendant cannot now change that date. Based upon the June 23, 2009 date set forth in the Notice, the TRO was timely obtained on June 22, 2009, before the cure period expired.

Defendant finally argues that plaintiff has not shown that it is willing and able to cure the default in the event the court ultimately does not find in plaintiff's favor. A tenant need not prove that it can cure the alleged violation in order to obtain a

Yellowstone injunction. All a tenant need do is convince the court of its desire and ability to cure the defects by any means short of vacating the premises. Jemaltown of 125<sup>th</sup> Street, Inc. v. Leon Betesh, 115 AD2d 381 (1<sup>st</sup> dept. 1985). Plaintiff has satisfied this standard.

Although defendant asks for a one million dollar bond, it has not shown how the amount sought bears any reasonable relation to damages that it may suffer 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 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. Plaintiff is willing to pay use and occupancy going forward and as a condition to the relief. It only takes issue with defendant demanding that even disputed rental arrears be paid. The monetary disputes that plaintiff has with defendant are articulated in the tenth and eleventh causes of action of the complaint. They are asserted for unjust enrichment and concern plaintiff undertaking the replacement of coil fans in its space. Regardless of whether plaintiff has a right of action for money damages, these items do not appear to be proper offsets to rent. The court, therefore, orders that as a condition to the Yellowstone injunction plaintiff be required to bring its rent current within the next forty five (45) days.

### **Conclusion**

In accordance with this decision, it is hereby:

**ORDERED** that the motion for a Yellowstone injunction is granted, and it is hereby

**ORDERED** that pending determination of the underlying action the cure period set forth in the May 29, 2009 Notice to Cure is hereby tolled, and it is further

**ORDERED** that as a condition to the continuation of the Injunction, plaintiff shall pay use and occupancy in the amount of rent reserved in the lease and as such amounts come due, and it is further

**ORDERED** that any arrears in rent that are currently outstanding shall be paid within 45 days of the date of this decision, and it is further

**ORDERED** that in the event plaintiff fails to make payments as set forth herein, the defendant may move this court to vacate the Yellowstone injunction, and it is further

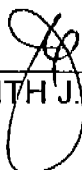
**ORDERED** that a preliminary conference is set for this matter to be held before the court on **October 1, 2009 at 9:30 a.m.**, and it is further

**ORDERED** that any requested relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
August 26, 2009

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C

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