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

PRESENT: TOLUB Justice PART 15

TH LINE CORP

- v -

3 EAST 44 LESSEE

INDEX NO. 113251/09

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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 DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
NOV 06 2009
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/6/09

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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TH LINE CORP.,

Plaintiff,

-against-

3 EAST 44 LESSEE, LLC

Defendant.

----------x

Index No.113251/09
Mtn. Seq.001

WALTER B. TOLUB, J.:

This is Plaintiff's motion for a temporary restraining order and a Yellowstone Injunction. Defendant cross-moves for an order vacating and setting aside the preliminary injunction.

Facts

Plaintiff entered into a lease agreement (Lease) with Defendant on March 22, 2007, for the 5th floor of a building located at 3 East 44th Street, New York, NY (Premises). The Lease expires in 2018.

Defendant is the Net Lessee of the building and the Premises.

On August 26, 2009, Defendant served Plaintiff with a Notice to Cure for Plaintiff's failure to comply with the Lease. In the Notice to Cure Defendant claims that Plaintiff is in breach of the Lease because; (1)Plaintiff failed to pay Defendant Base Rent; (2)Plaintiff failed to pay additional rent for heating and fuel billed in April 2008 [$2,227.60]; (3) Plaintiff failed to reimburse Defendant $5,000 for the cost of repairing damage

caused by Plaintiff upon moving in to the Premises; (4) Plaintiff violated the Lease by installing an awning with an advertisement without the Defendant's written consent; (5)Plaintiff installed a stairwell and piping/plumbing without the Defendant's consent, without obtaining permits and certificates as required by law; (6) Plaintiff failed to obtain insurance naming the Landlord as an additional insured; and (7) Plaintiff failed to deliver copies of proper insurance coverage to Defendant (Plaintiff's Ex. C).

On or about September 25, 2009, Plaintiff obtained an Order to Show Cause seeking a Yellowstone Injunction. The Order to Show Cause contained a temporary restraining provision enjoining Defendant from; (1) cancelling Plaintiff's leasehold interest; (2) interfering with Plaintiff's possession of the premises; (3) commencing a summary holdover proceeding; (4) commencing a declaratory action; (5)taking any action to terminate Plaintiff's leasehold interest based on the Notice to Cure; (6) terminating Plaintiff's use and possession of the Premises; (7) staying and tolling Plaintiff's time to cure the alleged defaults in the Notice to Cure.

Plaintiff argues that it should be granted a Yellowstone Injunction because the Notice to Cure is defective in that Defendant does not specifically indicate what it wants Plaintiff to cure. Plaintiff claims that it has tendered monthly installments of Base Rent and that defendant has refused to

accept payment and has stopped sending rent invoices to Plaintiff.

Defendant argues that the Notice to Cure is not defective and that any injunction in place should be vacated. Alternatively, Defendant argues that Plaintiff should be required to post a bond in the amount of $5 million dollars.

Discussion

In order to obtain a Yellowstone Injunction, the tenant must demonstrate that: (1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of lease termination; (3) it requested injunctive relief prior to the 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. (Lexington Ave. & 42nd St. Corp. v. 380 Lexchamp Operating Inc., 94 AD2d 421 [1st Dept 1994] *citations omitted*).

Here, the first element set forth has been met. It is undisputed that the Plaintiff and Defendant entered into a valid commercial lease.

The Landlord then served a Notice to Cure demanding, *inter alia*, unpaid rent, unpaid fees, demands for the removal of an awning and piping[1] and claims that Plaintiff failed to obtain

[1]The actual demand for "removal" is not in the Notice to Cure. The Court takes into consideration the cited Lease violations and interposes the actual demand for the "removal" although not specifically noted in the Notice.

proper insurance coverage throughout the Lease term. Therefore, Defendant threatened to terminate Tenant's Lease prior to the natural expiration date of the Lease if violations were not cured and the amount owed was not paid by September 22, 2009 (Plaintiff's Ex. C). As such, Plaintiff has also met the second and third elements for obtaining a Yellowstone Injunction.

The fourth and final element of obtaining a Yellowstone injunction is whether Plaintiff is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises. This step required further analysis.

Rent Arrears

Here, Defendant argues that Plaintiff's failure to timely pay Base Rent constitutes a material breach of the Lease. Plaintiff submits its June 5, 2009 rent payment which was returned to it by the Landlord. Although the payment is dated 5 days late, Defendant fails to show how such a late payment is not *di minimis* considering its acceptance of late rent for over a period of two years[2]. Nonetheless, it is a breach of lease. However, Plaintiff claims it is ready, willing and able to pay any and all Base Rent arrears (Aff. In Opp to Cross-Motion ¶8).

[2]It is noted that Defendant claims that although the checks are dated June 5, 2009, they were not mailed until June 16, 2009.

Pipes and Awning

Plaintiff claims that Defendant gave verbal approval when the pipes and awning were installed in 2007. Defendant argues, two years after the awning and piping were put into the Premises, that pursuant to the Lease, Plaintiff had to get written approval for such installations. Again, even if Plaintiff received oral approval for said installations, pursuant to §§2.02 and 4.08 of the Lease, Plaintiff had to get written authorization to do so. Plaintiff claims it is ready, willing and able to cure said violations by removal of the awning and piping (Aff. In Support ¶¶ 26 and 31).

Heating and Fuel

The Notice to Cure provides that Plaintiff has failed to pay for heating and fuel billed in April 2008 (Plaintiff's Ex. C). Plaintiff claims that Defendant has paid for the heating and fuel and may not now go back and make adjustments that would result in an overcharge for heating and fuel used by the Defendant. Plaintiff further claims that it has paid all *additional rent* for heating and fuel and that $2,227.60 is not due.

Section 3.04 of the Lease provides that:

> Landlord shall supply heating fuel for the heating system in the Premises. On the first day of October, November, December, January, February and March of the term, Tenant shall pay to Landlord as Additional Rent, an amount equal to the product obtained by multiplying two hundred (200) by the greater price per gallon most recently paid by Landlord for

> heating fuel at the Building and the then current price per gallon for heating and fuel of the type used in the Building. **Landlord and Tenant agree that determining Tenant's actual use of heating fuel is difficult and impracticable and agree to estimate Tenant's consumption as provided in this Section 3.04 (which actual consumption may be more or less than such estimate) and regardless of whether the heating unit and/or equipment at the premises is operational.** Tenant shall be solely responsible for the maintenance and repair costs of the heating unit and equipment servicing the Premises.

(*Emphasis added* Plaintiff's Ex. A p. 11).

Defendant argues that $2,227.60 is owed in heating and fuel charges. As stated in Defendant's June 17, 2009, letter: The amount calculated for heating and fuel is correct. As previously explained, the heat calculation was for 1,200 gallons (which represents 200 gallons for each of the 6 months referenced above) multiplied by $3.78 per gallon which equals $4,536 minus $2,308.40 paid by Tenant which equals $2,227.60. Thus, there is due and owing $2,227.60 to Landlord for Heating and fuel.

Plaintiff argues that it paid $461.68 on all of its heating bills because that was the price Defendant estimated fuel would cost for the applicable Lease term. Plaintiff received invoices and paid $461.68 for Heating and Fuel from October 2007 through February 2008 (Plaintiff's Ex. F). Plaintiff argues that, according to the Lease, Defendant is not entitled to review the heating bill after the estimate has been given and paid and charge Plaintiff for additional amounts Defendant may have

expended.

Section 3.04 of the Lease provides for payment of Heat and Fuel on an estimated basis only. As such, Plaintiff is not responsible for Additional Rent for Heat and Fuel for past invoiced amounts (2007-2008 year) (Reply Ex. B).

Lobby Damage

The Notice to Cure provides that Plaintiff failed to reimburse the Landlord the sum of $5,000, the cost of repairing the damage done to the lobby and the lobby ceiling over two years ago when Plaintiff moved to the Premises. Defendant has not provided Plaintiff or this Court with any invoices, bill, changes or even specified the damage caused to the lobby. As such, there is no basis to award Defendant $5,000 for damages allegedly caused by Plaintiff and the repairs that defendant claims were made.

Insurance

Plaintiff argues that it maintains and has always maintained continuous coverage on the Premises as required by the Lease (Letter to the Court dated October 29, 2009).

Plaintiff and Defendant entered into the Lease on March 22, 2007. Plaintiff first obtained insurance on September 27, 2007 (Letter dated October 29, 2009). Coverage under that policy expired on September 27, 2008). On August 28, 2008 Plaintiff renewed its coverage for a twelve month period effective as of

September 27, 2008. As such, Plaintiff was covered through September 27, 2009. However, Defendant argues that not all of the proper types of insurance were provided.

Although not attached to Plaintiff's moving papers, Plaintiff attached a copy of a Travelers Insurance policy to the October 29, 2009 letter for both the 2007/2008 year and the 2008/2009 year. Additionally, Plaintiff has attached as Exhibit K its policy for the 2009/2010 year[3].

Furthermore, Plaintiff's Reply papers indicate that Plaintiff has also obtained insurance coverage from April 17, 2009 through April 17, 2010, indicating that Plaintiff is current with coverage.

Conclusion

After a detailed analysis, it is clear that Plaintiff has met the requirements for a Yellowstone Injunction. Plaintiff has demonstrated that it holds a commercial lease (Plaintiff's Ex. A), that it received a Notice to Cure and a threat of lease termination (Plaintiff's Ex. C), it is undisputed that it requested injunctive relief prior to the termination of the

[3]The Court is aware of the Appellate Division, First Department's decision dated October 23, 2009 in 1190NKYUNG SIK KIM v. IDYL-WOOD, NY LLC., in which the Appellate Division affirmed the Supreme Court's Order denying Plaintiff's application for a preliminary injunction. In that case, Plaintiffs failed to maintain insurance coverage but were willing to cure the default. The Court held that getting insurance for the remaining lease period would not cure the default since such a new policy would not protect the defendant against unknown claims arising out of the period when there was no insurance coverage. In the case before this Court, it is clear that Plaintiff has been insured for the Lease terms.

lease, and that Plaintiff is ready, willing and able to cure its defaults and does not have to vacate the premises to do so.

Accordingly, it is

ORDERED that Plaintiff's motion for a Yellowstone Injunction is granted on the condition of Plaintiff's posting a $30,000 bond; and it is further

ORDERED that within 20 days from the date of service of a copy of this order with notice of entry, the Plaintiff will file with the Clerk of this Court and upon the attorneys for the Plaintiff a written notice of the bond; and it is further;

ORDERED that Plaintiff is directed to cure all defects within 60 days of service of a copy of this order with notice of entry.

ORDERED that the Clerk of the Court enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/6/09

HON. WALTER B. TOLUB, J.S.C.