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

PRESENT: JUDITH J. GISCHE PART 10

Justice

New Cingular Wireless
-v- PCS, LLC

Booth 15 Property, LLC

INDEX NO. 108048-09

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	

FILED
DEC 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

and PC Scheduled for Jan 28, 2010 @ 9:30 am in Part 10 60C Rm 232

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

Dated: Dec 16, 2009

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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New Cingular Wireless PCS, LLC,

Plaintiff (s),

-against-

Booth 15 Property, LLC,

Defendant (s).

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DECISION/ORDER
Index No.: 108048-2009
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

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

Papers	**Numbered**
Pltf OSC (yellowstone) w/SA affid, KMB affirm, exhs w/ proof of service (sep back)	1, 2
KMB affid of emergency (sep back)	3
Def x/m (u&o) w/JL affirm, HG affid, exhs	4
Def supp affirm in opp to pltf's motion w/JL affirm	5
Pltf's reply affirm (KMB) and affid in opp (SM)	6
Def's reply and in further support w/JL affirm	7
Steno Record 6/5/09	8

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

Plaintiff ("tenant") is the tenant of commercial space in defendant's ("landlord") building and this action is for a declaratory judgment that the tenant is not in default of its lease. Tenant has brought this motion for an order tolling the cure period ("Yellowstone injunction") set forth in the March 16, 2009 "Notice of Default and Opportunity to Cure" that landlord served. The landlord has cross moved for an order requiring the tenant to pay use and occupancy and for an undertaking.

The tenant sought, and was granted, a temporary restraining order ("TRO")

tolling the cure period, pending the court's decision on these motions (*see*, steno minutes 6/5/09).

The court's decision on these motions is as follows:

Arguments

The tenant is the successor in interest of Cellular Telephone Company d/b/a AT&T Wireless ("AT&T") and the landlord is the successor in interest of Booth House, Inc. This dispute arises under the parties' New York Structure Lease Agreement effective June 11, 2004 ("lease"), which is for an initial five (5) year term, automatically renewable for additional five (5) year terms according to the conditions contained in the lease.

As per the paragraph one (1) of the lease, tenant leases the following commercial space at 318 East 15th Street, New York, New York ("building") from the landlord:

> "(a) a room/cabinet/ground area space of approximately 150 square feet; and (b) space on the structure together with such easements as are necessary for the antennas and initial installation as described on attached Exhibit 1 (collectively the "Premises") . . ."

Paragraph 2 of the lease sets forth the tenant's permitted uses which include the following:

> "Tenant may use the Premises for the transmission and reception of communications signals and the installation, construction, maintenance, operation repair, replacement and upgrade of its communications fixtures and related equipment, cables, accessories and improvement, which may include a suitable support structure, associated antennas, equipment shelters or cabinets and fencing and any other items necessary to the successful and secure use of the Premises (collectively "Communications Facility") . . .

> Tenant further has the right to add, modify and/or replace equipment in order to be in compliance with any current or future [laws, etc.] . . . Tenant has the right to install and operate transmission cables from the equipment shelter or cabinet to the antennas . . . Tenant has the right to modify, supplement, replace, upgrade, expand the equipment, increase the number of antennas or relocate the Communications Facility within the Premises at any time during the Agreement . . ."

Tenant has installed cables in the stairwells of the building which bring electricity from the ground floor to the antennas on the roof. Although the Department of Buildings ("DOB") has not issued a violation, the landlord nonetheless contends the cables are in violation of section 27-375[j] of the building code. This section of the code prohibits piping within a stair enclosure, unless such piping is "required or permitted" by the building code, it is protected, and does not "reduce the required clearance of the enclosure . . ."

Tenant points out that AT&T installed the cable in the stairwell with the express knowledge and approval of the landlord's predecessor in interest and the landlord did not allow the cables to run on the exterior of the building , which AT&T had originally proposed. Thus, plaintiff argues that the installation was not only approved by the landlord, but was also specifically contemplated under the terms of the lease. According to tenant, the landlord signed AT&T's building permit application, AT&T obtained the necessary electrical and civil permits for the work and those were submitted to and approved by DOB.

Tenant argues that even if the cables have to corrected in some way, a complete

removal is not necessary, but can be enclosed within soffits and also by wrapping them with fire retardant insulation which is code compliant. Tenant has obtained a proposal for this work and represents it can afford the modifications ($15,770). Tenant also provides the sworn affidavit of its architect ("Marbella") who states her firm designed the installation and obtained the necessary permits, but states that any potential violation of the building code can nonetheless be remedied in the manner described.

The landlord provides the sworn affidavit of its Director of Construction and Design ("Goodhue") who states that the tenant never provided details plans of how the cables would be installed and that the agreement or consent the landlord gave (if at all) was uniformed. Alternatively, Goodhue maintains that the only cure is removal of the cables, altogether. Landlord seeks the payment of use and occupancy by the tenant and the posting of a bond because of the potential for property damage if the tenant has to remove the cables altogether.

Discussion

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]; Post v. 120 East End Avenue Corp., 62 NY2d 19 [1984]; Long Island Gynecological Services, v. 1103 Stewart Avenue Associates, 224 AD2d 591 [2nd 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]; First Natl. Stores v. Yellowstone Shopping Ctr., *supra*). Tenant easily meets the first three requirements for a Yellowstone injunction; the only dispute is whether the tenant is prepared and able to cure the alleged defaults. For the reasons that follow, the court finds that the tenant has satisfied that fourth (4th) requirement as well and its motion for a Yellowstone injunction must be granted.

The landlord takes the position that the only cure is a complete removal of the cables because the building code does not allow obstructions (like pipes, etc.) in stairwells. However, tenant has provided the sworn affidavit of an architect who not only states the necessary permits were obtained for the work, but even if the cables cannot remain in their present condition, there are other alternatives available which the tenant is ready willing and able to take to bring itself within the building code, if it is not already in compliance. Thus, although the tenant has established the cables can be encapsulated and that will take care of any building violations, the landlord has not established that encapsulation is not a suitable and/or viable option.

Arguments by either side about whether the landlord's predecessor in interest did or did not approve the installation of cables in the first place is inconsequential. If, in fact, there is a code violation it will have to be addressed sooner or later, regardless of whether the landlord approved of the installation. Nor does it matter whether the landlord has a "motive" for why it has brought up this "violation" in the first place since the DOB has not issued a violation or fine.

Landlord's cross motion for past and ongoing use and occupancy is granted. It

would be unjust to allow tenant to remain in possession of, and derive substantial benefits from, the premises for such an extended passage of time without such payments. Therefore, payment of use and occupancy, past, current and ongoing, by the tenant according to the terms of its lease is a condition of the granting and continuation of the Yellowstone injunction (401 Hotel, L.P. v. MTI/The Image Group, Inc., 271 AD2d 228 [1st Dept 2000]).

The granting of any preliminary injunction requires that plaintiff post an undertaking (CPLR § 6312 [b]). A Yellowstone injunction is a special type of preliminary injunction and an appropriate bond should be posted. Although the landlord contends the undertaking should cover its property damages if the cables are removed and that a hearing should be held, the purpose of the undertaking is to cover the landlord's damages, if it is finally determined that the tenant was not entitled to the preliminary injunction it obtained (Drexel Burnham Lambert Inc. v. Ruebsamen, 171 AD2d 457 [1st Dept 1991]). Other than the property damage claim, the landlord sets forth no arguments about how much the bond should be, or why a hearing is required. If necessary, and at the appropriate time, the damages sustained by reason of a preliminary injunction may be ascertained upon motion (CPLR 6315). Since the court is requiring that the tenant pay past and ongoing use and occupancy, only a nominal bond is really necessary. The court will require that tenant post an undertaking of $5,000 as a condition of the preliminary injunction (61 West 62nd Owners Corp. v. Harkness Apartment Owners Corp., 173 AD2d 372 [1st Dept. 1991]). It must be posted within Ten (10) Days from the date of this decision.

Based upon the foregoing, tenant-plaintiff's motion for a preliminary injunction is

granted and pending the determination of this action, the operation and effect of defendant-landlord's notice dated March 16, 2009 is tolled and defendant-landlord, its agents, etc., is enjoined and stayed from taking any further steps or actions of any kind to: [a] recover possession of the leased premises, or [b] cancel or terminate the lease based upon the notice dated March 16, 2009 and defendant-landlord is prohibited from serving any notices of default, cancellation, and/or termination, based upon the same alleged defaults under the lease.

Since a preliminary conference has not been held in this case, one is scheduled for **January 28, 2010 at 9:30 a.m. in Part 10, 60 Centre Street**. No further notices will be sent.

Conclusion

Based upon the foregoing, it is hereby

ORDERED that tenant's motion for a Yellowstone injunction is granted; pending the determination of this action, the operation and effect of defendant-landlord's notice dated March 16, 2009 is tolled; defendant-landlord, its agents, etc., is enjoined and stayed from taking any further steps or actions of any kind to: [a] recover possession of the leased premises, or [b] cancel or terminate the lease based upon the notice dated March 16, 2009 and defendant-landlord is prohibited from serving any notices of default, cancellation, and/or termination, based upon the same alleged defaults under the lease; and it is further

ORDERED that landlord's cross motion for use and occupancy is also granted and payment of use and occupancy (past, current and ongoing), by the tenant according to

the terms of its lease is a condition of the granting and continuation of the Yellowstone injunction; and it is further;

ORDERED that the landlord's cross motion for an undertaking is granted as well and the tenant must post an undertaking of Five Thousand ($5,000) as a condition of the Yellowstone injunction and said sum must be posted within Ten (10) Days from the date of this decision; it is further

ORDERED that the preliminary conference in this case is scheduled for **January 28, 2010 at 9:30 a.m. In Part 10, 60 Centre Street**; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
December 16, 2009

So Ordered:

Hon. Judith J. Gische, J.S.C.