

**10th Ave. Live Poultry, Inc. v 3801 Equity Co., LLC**

2009 NY Slip Op 33087(U)

November 17, 2009

Supreme Court, New York County

Docket Number: 603142/09

Judge: Judith J. Gische

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

PRESENT: Gische  
Justice

PART 10

10<sup>th</sup> Ave Live Poultry, Inc.

INDEX NO. 603142/09

- v -

3801 Equities Co., LLC

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 8

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Yellowstone Twp.

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**  
NOV 24 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

*And PC is scheduled for  
January 21, 2010 at 9:30 am  
Part 10, 60 Centre St Rm 232*

Dated: Nov. 17 2009

[Signature]  
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  
10<sup>th</sup> Avenue Live Poultry, Inc.

Plaintiff (s),

-against-

3801 Equity Company, LLC,

Defendant (s).

**DECISION/ORDER**

Index No.: 603142/09

Seq. No.: 001

**PRESENT:**

Hon. Judith J. Gische

J.S.C.

**FILED**  
NOV 24 2009

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

<b>Papers</b>	<b>Numbered</b>
Pltf OSC w/AA affirm, LK affirm of emergency, exhs	1
Def's opp w/TH affid, exhs	2
Pltf's reply w/LK affirm, exhs	3

NEW YORK COUNTY CLERKS OFFICE

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

This is an action for declaratory relief. By Order to Show Cause signed October 14, 2009, this court granted plaintiff 10<sup>th</sup> Avenue Poultry, Inc. ("tenant") a temporary restraining order ("TRO") after hearing argument by each side (Uniform Rules of Trial Courts 202.7[f]). The TRO remains in effect pending the court's decision on this motion which is for a "Yellowstone Injunction," staying defendant 3801 Equity Company, LLC ("landlord") from commencing a summary proceeding in the Civil Court of the City of New York. Landlord opposes this motion.

**Arguments**

The tenant and landlord entered into a lease agreement dated January 25, 2001 for store number 3 ("store") at 3801 Tenth Avenue, New York, New York 10034 ("premises"). The lease allows the store to be used for the "Retail Sale of Live Poultry."

Paragraph 60 of the lease requires the tenant to "file for and obtain permits and plans and a 'Certificate of Occupancy' for the use of the premises . . ." A rider to the lease (paragraph 77) requires the tenant to "immediately give up possession of the space to the landlord" if the tenant is unable to secure its license to operate a retail poultry store within that space.

On November 24, 2008, the New York City Department of Buildings ("DOB") issued two ECB violations to the landlord. ECB Violation No. 34740876J fines the landlord for allowing the premises to be used contrary to its certificate of occupancy (sale and slaughter of live poultry). The other violation [ECB Violation No. 34740875H] is for the illegal use/operation of a live poultry store in a residential district. The latter violation states that the "slaughter of animals is only allowed in [a] manufacturing -3 district (M-3), but the subject building is located in an R7-2 [residential] district."

After the landlord received these violations, it served the tenant with a Notice to Cure dated June 18, 2009. Thereafter, the parties agreed in writing to extend the expiration dated of the Notice to Cure from July 12, 2009 by another sixty (60) days. The extension was effective from August 4, 2009, thus the sixty day period ended on October 4, 2009.

Paragraph 5 of the extension agreement provides as follows:

"5. Should the sixty (60) day period expire "before the tenant is able to obtain the dismissal of the violations and/or otherwise resolve such violations and/or obtain appropriate approval in order to continue Tenant's current use of the demised premises, Tenant shall make a written request to Landlord through Landlord's attorney to extend the time to obtain its dismissal and/or required approvals for Tenant's current use of the demised premises and Landlord may in its sole discretion provide a reasonable

extension of time for up to thirty (30) additional days for Tenant to do so provided that Tenant can demonstrate through documentary evidence that Tenant has taken all appropriate measures and/or steps to achieve the dismissal and/or resolution and/or approval and that same are forthcoming."

The landlord served the tenant with a Fifteen (15) Day Notice of Termination dated October 5, 2009 ("termination notice") which, according to plaintiff, it received on October 9, 2009. It is plaintiff's contention that the landlord served the termination prematurely because it (tenant) had another thirty (30) days left in which to either obtain dismissal of the violations or obtain approval of tenant's use of the store to sell live poultry or obtain a modification of the certificate of occupancy.

The landlord argues that the tenant incorrectly assumed it would get an automatic thirty (30) day extension, when this is not what they had agreed, or the extension agreement provides. Landlord agrees that the tenant asked for the extension, but it was denied not only because the decision to extend the cure period was within its sole discretion, but also because the tenant had not obtained the necessary approval for the operation of its business. According to landlord, the tenant has no ability to cure its breach of the lease and has not stopped operating its illegal business.

Plaintiff argues that it can cure, but that it just needs more time to do so. Plaintiff argues a scheduled hearing before the DOB on December 17, 2009 and it has been working closely with an expediter who has assured the tenant that the space is currently zoned for a live poultry market.

### **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 [2<sup>nd</sup> 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*).

There is no dispute that the tenant had a lease for the store and the landlord served a notice to cure, notifying the tenant that the lease would be terminated if the violations of its lease were not cured. Thus, the tenant has satisfied the first two requirements for a Yellowstone injunction. The parties disagree, however, whether tenant brought this action before the lease was terminated and while the cure period was in effect. They also disagree about the tenant's ability to cure its alleged violations of the lease. For reasons that follow, the court finds that this application for a Yellowstone injunction was not timely requested by the tenant, and the tenant has not otherwise shown it can cure the breach of the lease alleged.

The parties' extension agreement provided the tenant with an additional sixty (60) days from August 4, 2009 to obtain the dismissal of and/or otherwise resolve the DOB violations and/or obtain whatever approval was necessary for the tenant to continue the legal operation of its live poultry business at the premises. It is unrefuted that the

[\* 6]

violations against the property have not been removed, the certificate of occupancy has not been changed, no agency has declared that plaintiff can lawfully operate a poultry business at the store, nor is there any pending application for a variance. Thus, the tenant failed to cure its breach under the lease by October 4, 2009, and it is still not cured. Other than claiming that the ECB violations are in error, plaintiff has not advanced any plan to cure the underlying conditions, in the event it is wrong about the violations.

Although the cure period could be extended by another thirty (30) days by the landlord, this was entirely up to the landlord's "sole discretion," and the extension did not have to be a full thirty (30), but "up to" thirty (30) days. The tenant did not bring this order to show cause until October 14, 2009, after the sixty (60) day extension had expired and not been extended by the landlord. Therefore, by the time the tenant sought court intervention, the cure period had already ended. By failing to seek timely toll of the curative period before the cure period expired, the court is divested of its power to grant a Yellowstone injunction (Long Island Gynecological Services. v. 1103 Stewart Avenue Associates, supra).

The court has also considered plaintiff's other claim, that the landlord did not act in good faith because it served a termination notice instead of giving the tenant another thirty (30) day extension to try to get violations removed legalized because it was making diligent efforts to do so. Plaintiff has not tried to legalize the current use of the premises; it is simply challenging the DOB's (and landlord's) position that the present use is illegal and cannot be continued. This claim can be presented as a defense in any subsequently commenced Civil Court action; it is not a basis to toll any cure period.

Finally, although plaintiff argues that a hearing is presently scheduled before the

DOB for December 17, 2009 and the landlord should "be patient" until then, there is no reason for this court to impose any stay on the landlord in the absence of plaintiff's having otherwise satisfied the requirements for a Yellowstone injunction.

Since the tenant is still operating a live poultry business at the premises and has not obtained the approvals necessary to operate that business which is in a residential district, the tenant has neither shown a willingness or ability to cure the violations of the lease that the landlord alleges exist. The time to cure has expired and the landlord did not extend it. Therefore, the tenant is not entitled to a Yellowstone injunction and its motion must be denied.

All previously granted stays are hereby vacated forthwith.

This case is scheduled for a preliminary conference on **January 21, 2010 at 9:30 a.m.** in Part 10, 60 Centre Street, Room 232. No further notices will be sent.


**Conclusion**

Plaintiff/tenant's motion for a Yellowstone injunction is hereby denied. All previously granted stays are hereby vacated forthwith. This case is scheduled for a preliminary conference on **January 21, 2010 at 9:30 a.m.** in Part 10, 60 Centre Street, Room 232.

Any relief requested that has not been addressed has nonethless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
November 17, 2009

**FILED**  
NOV 24 2009  
NEW YORK  
COUNTY CLERK'S OFFICE  
So Ordered:  
  
Hon. Judith J. Gische, J.S.C.