

**575 First Ave. Corp. v Board of Mgrs. of the Kips Bay
Towers Condomnium**

2009 NY Slip Op 33108(U)

December 16, 2009

Supreme Court, New York County

Docket Number: 109295/2009

Judge: Doris Ling-Cohan

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

PRESENT: **JUSTICE DORIS LING-COHAN**
Justice

PART 36

575 First Ave Corp.

INDEX NO.

109295/09

MOTION DATE

- v -

MOTION SEQ. NO.

001

The Bd. of Managers of
The Kips Bay Towers Condominium

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 ...

1, 2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*for an injunction
is granted in accordance with the attached
Memorandum decision*

FILED

JAN 04 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/16/09

JUSTICE DORIS LING-COHAN

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 - NEW YORK COUNTY
PRESENT: Hon. DORIS LING-COHAN, Justice **PART 36**

-----X

575 FIRST AVE. CORP.,

Index:
109295/2009

Plaintiff,
-against-

Motion Seq. 001
DECISION/ORDER

THE BOARD OF MANAGERS OF THE KIPS BAY
TOWERS CONDOMINIUM a/k/a THE CONDOMINIUM
BOARD OF THE KIPS BAY TOWERS CONDOMINIUM,
INC. and COOPER SQUARE REALTY, INC.,
Defendant.

-----X

Plaintiff is a commercial tenant operating a parking garage at defendants' condominium. On or about June 30, 2009, plaintiff commenced this declaratory judgment action based upon defendants' alleged breach of the lease, for failure to comply with a provision of the second lease modification, requiring that the landlord amend the lease and promptly execute and deliver to the tenant such instruments in recordable form as necessary to obtain leasehold financing. [See Order to Show Cause, Exh. F]. Thereafter, on or about July 2, 2009, defendants served plaintiff with a Notice of Default and Opportunity to Cure, based upon plaintiff's failure to make a payment of \$2.5 million, due pursuant to the parties' lease extension and modification agreement dated January 1, 2008.

Plaintiff tenant has moved by order to show cause for a "Yellowstone injunction", pursuant to *First National Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 NY2d 630 (1968). Specifically, plaintiff seeks an order staying and tolling the expiration of the cure period set forth in the Notice of Default and Opportunity to Cure dated July 2, 2009 and enjoining and restraining defendants from taking any action to terminate plaintiff's valuable leasehold.

To obtain a *Yellowstone* injunction, the tenant-movant must show that: (1) it holds a commercial lease; (2) the landlord served upon tenant-movant a notice to cure or notice of defect, or that it faces threat of lease termination; (3) it sought 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

other than vacating the subject premises. *Lexington Ave. & 42nd St. Corp. v. 380 Lexchamp Operating, Inc.*, 205 AD2d 421, 423 (1st Dept 1994); *see also 225 E. 36th St. Garage Corp. v. 221 E. 36th Owners Corp.*, 211 AD2d 420 (1st Dept 1995).

“The purpose of a *Yellowstone* injunction is to maintain the status quo so that the tenant may challenge the landlord’s assessment of its rights without the tenant, during the pendency of the action, forfeiting its valuable property interest in the lease...As such, it may be granted on less than the normal showing required for preliminary injunctive relief...”

Lexington Ave. & 42nd St. Corp. v. 380 Lexchamp Operating, Inc., 205 AD2d at 423; *see also Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc.*, 93 NY2d 508 (1999); *Garland v. Titan West Associates*, 147 AD2d 304 (1st Dept 1989).

Here, plaintiff has made a sufficient showing to warrant the granting of a *Yellowstone* injunction as conditioned below. Specifically, plaintiff: (1) holds a commercial lease; (2) faces the threat of lease termination in that plaintiff received from defendants a Notice of Default and Opportunity to Cure dated July 2, 2009, threatening lease termination if the alleged violation was not cured; (3) timely requested injunctive relief prior to the effective termination date; and (4) is prepared and maintains the desire and ability to cure any violation determined by this court, by a means other than vacating the subject premises. *See Terosal Props. v. Bellino*, 257 AD2d 568 (2nd Dept 1999); *Lee v. TT & PP Main St. Rlty., Corp.*, 286 AD2d 665 (2nd Dept 2001). Thus, a temporary injunction is proper to preserve the status quo and prevent the forfeiture of plaintiff’s valuable interest in the leasehold, prior to the adjudication of the parties’ rights. *See Lexington Ave. & 42nd St. Corp. v. 380 LexChamp Operating, Inc.*, 205 AD2d at 424; *Caspi v. Madison 79 Assoc., Inc.*, 85 AD2d 583 (1st Dept 1981).

While defendants oppose the granting of a *Yellowstone* injunction, arguing, *inter alia*, that plaintiff has failed to submit evidence of a genuine ability to cure, such is not a requirement for the granting of a *Yellowstone* injunction. *Jemaltown of 125th Street, Inc. v. Leon Betesh/Park Seen Rlty Assoc.*, 115 AD2d 381 (1st Dept 1985). The court in *Jemaltown of 125th Street, Inc. v. Leon Betesh/Park Seen Rlty Assoc.*, specifically stated that:

“Rather than requiring the tenant to prove, on his application, that he can cure the alleged defects, all he need do to obtain a *Yellowstone* injunction is convince the court of his desire and ability to cure the defects by any means short of vacating the premises...”

Id. at 382 (citation omitted, emphasis supplied). Thus, *Jemaltown, supra*, makes clear that the full evidentiary proof of its ability to cure is not required at this juncture, contrary to defendant’s claim. Here, plaintiff has made an adequate showing to warrant the granting of a *Yellowstone* injunction.

Further, the court notes that “the law does not favor [the] forfeiture of...leasehold[s] (*Herzfeld & Stern v. Ironwood Rlty. Corp.*, [102 AD2d 737, 738]”. *225 E. 36th St. Garage Corp. v. 221 E. 36th Owners Corp.*, 211 AD2d at 422; *Zaid Theatre Corp. v. Sona Rlty Co.*, 18 AD3d 352(1st Dept 2005). Thus, this order is rendered to maintain the status quo during the course of this litigation.

In accordance with CPLR 6312(b), however, the granting of the *Yellowstone* injunction is conditioned upon plaintiff’s posting of a bond in the amount of \$2.5 million, within 30 days, which would protect defendants if it is ultimately determined that injunctive relief was not appropriate. See *61 West 62nd Owners Corp. v. Harness Apartment Owners Corp.*, 173 AD2d 372 (1st Dept 1991).

Based upon the above, it is

ORDERED that plaintiff’s motion for a preliminary injunction is granted, to the extent that the termination date set forth in the subject Notice of Default and Opportunity to Cure dated July 2, 2009 is tolled and defendants, any of its partners, members and agents, are restrained from taking any further steps to terminate plaintiff’s lease on the basis of any of the alleged defaults asserted in such Notice of Default, pending the determination of this action, *on condition that*: (1) plaintiff timely pays the rent in accordance with the terms of the parties’ lease and any applicable lease modifications, throughout the course of this litigation; and (2) within 30 days of entry of this order, plaintiff posts a bond in the amount of \$2.5 million; and it is further

ORDERED that within twenty (20) days of entry of this decision/order, plaintiff shall serve a copy upon defendants with notice of entry.

This constitutes the decision and order of the Court.

Copies of this order shall be supplied to all parties by the Clerk of this Part.

Dated: December 16, 2009


JUSTICE DORIS LINS-COHAN

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if Appropriate: DO NOT POST
J:\Preliminary Injunctions\yellowstone injunction\575 first ave. bd of managers.wpd

FILED
JAN 04 2010
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