MEMO DECISION

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES Justice — IA Part 17

CANAL FURNITURE CORP.,

Plaintiff,

- against -

MARILYN HARRISON,

Defendant.

Index Number 18467 2010

Motion Date November 10, 2010

Motion Cal. Number 19

Motion Seq. No. 1

The following papers numbered 1 to 27 read on this order to show cause by plaintiff for a preliminary injunction to enjoin defendant from commencing any summary proceeding to terminate its commercial lease or otherwise interfering with its possession of the premises; cross motion by defendant to change the venue from Queens County to New York County and cross-cross motion by plaintiff for cost and sanctions against defendant.

	Papers Numbered
Oder to Show Cause - Affidavits - Exhibits.....	1-6
Notice of Cross Motion - Affidavits-Exhibits.....	7-12
Notice of Cross-Cross Motion- Affidavits.....	13-16
Answering Affidavits-Exhibits	17-27

Upon the foregoing papers it is ordered that the order to show cause is granted; the cross motion is granted and the cross-cross motion is denied.

This action arises out of a commercial lease agreement executed on July 1, 1999. The lease contains an option to buy the premises by plaintiff.

Order to Show Cause

Defendant served a notice to cure dated May 6, 2010 pertaining to a lack of proper and full insurance required and eighteen other alleged items of default on the lease ranging from defects of the building as initially leased to plaintiff to regular repairs and to a newly approved certificate of occupancy for the basement. On June 3, 2010, defendant served a fourth notice to cure regarding the sidewalk replacement project. On June 28, 2010, a defective notice of additional rent was served claiming $30,439.85 for legal and architectural fees alleged incurred by landlord due to alleged "default" by plaintiff-tenant. The sixth and final notice to cure dated July 15, 2010 provides until July 28, 2010 to cure the alleged default regarding the lack of payment of the additional rent.

Plaintiff now seeks to enjoin defendant from commencing any summary proceeding to terminate its commercial lease or otherwise interfering with its possession of the premises as a result of the most recent notice to cure dated July 15, 2010.

Yellowstone injunctions are routinely granted to avoid forfeiture of a commercial tenant's interest prior to a determination of the merits. (*Post v 120 East End Ave. Corp.*, 62 NY2d 19 [1984]; *First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968].) A tenant must demonstrate the existence of a commercial lease, receipt of a notice of default, a timely application for a temporary restraining order and the desire and ability to cure the alleged default. (*Purdue Pharma, LP v Ardsley Partners, LP*, 5 AD3d 654 [2004].) While defendant asserts the cure period has expired by virtue of plaintiff's failure to obtain an extension of the temporary restraining order until the determination of the motions, it is this court's policy to deem all stays continued on the submission date until an order resolving the matter is issued.

Plaintiff is likely to succeed on the merits based upon clause #31 of the said lease agreement, wherein the parties agreed to extend the plaintiff with an option to purchase the property until and including June 30, 2003, for the sum of $2,000,000, with the exercise option payment to equal 10% of said price, or $2,000. On June 20, 2003, plaintiff sent certified mail return receipt requested to the appointed escrow agent exercising said option purchase price and enclosed the full remaining payment of the down payment. On June 17, 2007, defendant acknowledged through the appointed escrow agent receipt of the required down payment and fully recognized the option exercise. Realizing that upon the sale of the property, defendant would incur a very large capital gains tax and also realizing that the price of $2,000,000 negotiated in 1999, was now lower than the current market price, defendant sought to renege on the negotiations. Plaintiff submits that defendant demonstrated such reluctance by issuing a number of notices to cure regarding the property.

Plaintiff sustained its burden of establishing a likelihood of success on the merits by submission of documentary evidence establishing that its use of the subject premises was lawful and in accordance with the terms of the lease. In this regard, the plaintiff was entitled to a reduced degree of proof with respect to this issue, since the denial of a preliminary injunction in this case would disturb the status quo and likely render the final judgment ineffectual (*see North Fork Preserve, Inc. v Kaplan,* 31 AD3d 403 [2006]; *State of New York v City of New York,* 275 AD2d 740 [2000]; *Gramercy Co. v Benenson,* 223 AD2d 497, 498 [1996]). Furthermore, the imminent threat of the plaintiff's loss of a valuable, long-term leasehold interest in the absence of an injunction satisfies the irreparable harm requirement for a preliminary injunction (*see Chrysler Realty Corp. v Urban Inv. Corp.,* 100 AD2d 921 [1984]). A balance of the equities likewise favors the granting of preliminary injunctive relief to maintain the status quo pending the resolution of the action (*see* e.g. *S.P.Q.R. Co., Inc. v United Rockland Stairs, Inc.*, 57 AD3d 642 [2008]; *Jiggetts v Perales,* 202 AD2d 341 [1994]).

In light of the foregoing, a sufficient demonstration of the remaining elements and the necessity of a preliminary injunction to avoid termination of a valuable leasehold interest in the property, injunctive relief is warranted. (*See, Gihon, LLC v 501 Second St., LLC*, 306 AD2d 376 [2003]; *Marathon Outdoor, LLC v Patent Constr. Sys. Div. of Harsco Corp.*, 306 AD2d 254 [2003]; *Terosal Props. v Bellino*, 257 AD2d 568 [1999].)

Accordingly, a preliminary injunction is granted to the extent that defendant is enjoined from pursuing summary proceedings to evict plaintiff, taking any action to terminate the subject lease, or otherwise interfering with plaintiff's occupancy, and possession of the premises on the basis of defaults set forth in the notices to cure during the pendency of this action. The foregoing is conditioned upon plaintiff remaining current on all rents due and owing and filing an undertaking in accordance with CPLR 6312, which amount shall be fixed in the order to be entered hereon. Upon settlement of the order, the parties may submit proof and recommendations as to the amount of the undertaking.

Cross Motion to Change Venue

The cross motion by defendant to change the venue of the instant action from Queens to New York County, is granted.

Defendant is and was at all relevant times hereafter, the owner and landlord of the building located at 402 Broadway, New York, New York (the premises). Plaintiff Canal Furniture Corp. (tenant) is and was at all relevant times, hereinafter, the tenant of the premises pursuant to a written lease dated July 1, 2004 between Marilyn Harrison as landlord and Canal Furniture Corp, as tenant. Plaintiff commenced this action in the County of

Queens by Order to Show Cause dated July 22, 2010, seeking a preliminary "Yellowstone" injunction to enjoin defendant, pending the hearing of this action, from commencing any summary or other proceeding to terminate or cancel the leasehold interest and the lease of plaintiff tenant with respect to the premises.

Section 503 of the CPLR, entitled "Venue based on residence" states, in relevant part, as follows:

> (a) Generally. Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced . . .
>
> (b) Corporation. A domestic corporation . . shall be deemed a resident of the county in which its principal office is located . . .

It is undisputed that defendant, a natural person, is a resident of New York County. Defendant never was and is not a resident of Queens County. Pursuant to CPLR § 503 (b), plaintiff, a corporation, is a resident of New York County only and no other county for venue purposes since plaintiff is a domestic corporation having its principal and only place of business in New York County. Significantly, the certificate of incorporation lists the company's residence as New York County.

To effect a change of venue pursuant to CPLR 510(1), a defendant must show that the plaintiff's choice of venue is improper and that its choice of venue is proper (*see* CPLR 511[b]; *Gonzalez v Sun Moon E*nterprises Corp., 53 AD3d 526 [2008]; *Nixon v Federated Dep't Stores,* 170 AD2d 659 [1991]). Defendant established through the certificate of incorporation that the principal office of Canal Furniture Corp. is located in New York County (*see* CPLR 503[c]; *Hamilton v Corona Ready Mix, Inc.,* 21 AD3d 448, 449 [2005]; *Altidort v Louis,* 287 AD2d 669 [2001]; *Panco Dev. Corp. v Platek,* 262 AD2d 292 [1999]), and proffered documentary evidence to confirm their attorney's assertion that the defendant was not a resident of Queens County at the commencement of the action (*see Broderick v R.Y. Mgt. Inc.,* 13 AD3d 197, 786 NYS2d 484). The documentary evidence presented by the plaintiff in opposition only confirmed its assertion that Canal Furniture Corp is a resident of New York County when the action was commenced.

Moreover, there is no legal authority for plaintiff's assertion that venue should be in Queens based upon the Queens residence of the shareholders of Canal Furniture Corp. It is well settled that the sole residence of a domestic corporation for venue purposes is the county designated in its certificate of incorporation (*see Cenziper v Gross*, 175 AD2d 226 [1991];

Saal v Claridge Hotel & Casino, 152 AD2d 631 [1989]; *Papadakis v Command Bus Co.,* 91 AD2d 657 [1982]; *Bailey v New York Racing Assn.*, 90 AD2d 710 [1982]; *United Credit Corp. v Le Roy Adventures,* 61 AD2d 742 [1978]). Thus, New York County, rather than Queens County, is the appropriate venue for this action. Accordingly, the cross motion to change the venue from Queens County to New York County, is granted.

The clerk of the Supreme Court, Queens County, is directed to deliver to the Clerk of the Supreme Court, New York County, all papers filed in the action and certified copies of all minutes and entries (*see* CPLR 511[d]) and [3]), *sua sponte,* consolidating this action with the action pending in New York County, under Index No. 109757/10.

Cross-Cross Motion

Plaintiff seeks costs and sanctions against defendant on the ground that defendant allegedly breached the terms of the temporary restraining order by commencing an action in New York County pertaining the same defaults of said lease against the principals of the plaintiff-tenant in this action. Plaintiff's cross-cross motion is denied as untimely as plaintiff served the instant cross-cross motion only seven days prior to the return date instead of the twelve required by law (*see* CPLR §§ 2103 and 2214). As this Part's rules clearly state, "Motion papers, answering affidavits and reply affidavits which are not served in conformity with CPLR 2214 will not be accepted."

Conclusion

The order to show cause is granted; the cross motion is granted and the cross-cross motion is denied.

Settle Order

Dated; December 21, 2010

J.S.C.