

**833 Madison Enters., Inc. v A.L. Holdings, Inc.**

2011 NY Slip Op 30650(U)

March 16, 2011

Sup Ct, New York County

Docket Number: 112729/10

Judge: Joan A. Madden

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

PRESENT: MADDEN  
Justice

PART 11

833 MADISON ENTERPRISES  
- v - ISC  
A.L. HOLDINGS INC

INDEX NO. 112729/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 1  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is determined in accordance with the annexed decision and order.*

**FILED**

MAR 21 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: March 16, 2011

[Signature]  
HON. JOAN A. MADDEN *S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION *ISC*

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 11

-----X  
833 MADISON ENTERPRISES, INC.,

Plaintiff,

INDEX NO. 112729/10

-against-

A. L. HOLDINGS, INC.,

**FILED**

Defendant.

**MAR 21 2011**

-----X  
JOAN A. MADDEN, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

In this action involving a dispute between a commercial tenant and landlord, plaintiff tenant is moving by order to show cause for a Yellowstone injunction: 1) staying and tolling the expiration of the cure period contained in the Notice of Default Under Lease dated September 20, 2010, pertaining to plaintiff's commercial lease for retail space in the building located at 833 Madison Avenue, New York, New York; and 2) restraining and enjoining defendant, its employees, agents, servants, representatives and all other persons acting on its behalf, from taking any action to terminate plaintiff's lease, from commencing any action or proceeding to obtain possession of the premises, and from otherwise attempting to gain possession of the premises. Defendant landlord opposes the motion.

The purpose of a Yellowstone injunction is to "maintain the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits, the tenant may cure the default and avoid a forfeiture." Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Assocs., 93 NY2d 508, 514 (1999).

“As such, it may be granted on less than the normal showing required for preliminary injunctive relief.” Lexington Avenue & 42<sup>nd</sup> St. Corp. v. 380 Lexchamp Operating, Inc., 205 AD2d 421, 423 (1<sup>st</sup> Dept. 1994). In order to obtain a Yellowstone injunction, a tenant must demonstrate that: 1) it holds a commercial lease; 2) it received from the landlord a notice to cure, a notice of default, or a threat that the lease would be terminated; 3) it requested injunctive relief prior to the expiration of the cure period and 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. See Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Assoc., *supra*.

Plaintiff has made a sufficient showing for Yellowstone relief. It undisputed that plaintiff holds a commercial lease for a portion of the ground/first floor, second floor and basement premises of the building located at 833 Madison Avenue in Manhattan. It is also undisputed that plaintiff received a Notice of Default Under Lease dated September 20, 2010, stating that it was “in default under the Lease in that Tenant is justly indebted to Landlord” in the amount of \$97,113.11 for “minimum rent” and real estate taxes for August and September 2010, plus late fees, legal fees and costs.

Plaintiff made a timely application for Yellowstone relief prior to the expiration of the cure period, by securing the instant order to show cause on September 28, 2010. Although the Notice of Default Under Lease states that plaintiff is required to cure the alleged default by paying the sum of \$97,113.11 “on or before September 27, 2010,” plaintiff submits email correspondence showing that defendant’s counsel agreed to “deem” that date as September 29, 2010. Plaintiff has also established its willingness and ability to cure the alleged default, by submitting a sworn statement from its Assistant Secretary Frank Ferrante, that “in the event that

this Court rules that Plaintiff is not entitled to a rent credit then Plaintiff will pay the claimed arrears in order to maintain its Lease.”

In opposing the motion, defendant merely addresses the likelihood of plaintiff's success on the merits of the underlying dispute as to whether it is entitled to the alleged rent credit. The law, however, is clear that a Yellowstone injunction “may be granted on less than the normal showing required for preliminary injunctive relief.” Lexington Avenue & 42<sup>nd</sup> St. Corp. v. 380 Lexchamp Operating, Inc., *supra* at 423.

Based on the foregoing, plaintiff is entitled to a Yellowstone injunction so as to maintain the status quo and afford it an opportunity to cure should it be found in default of its lease obligations. See Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Assoc., *supra*. In view of the considerable value of plaintiff's improvements, and its representation that it has been and will continue to pay ongoing rent pending this litigation, defendant's request for an undertaking is denied. See WPA/Partners LLC v. Port Imperial Ferry Corp., 307 AD2d 234 (1<sup>st</sup> Dept 2003); John A. Reisenbach Charter School v. Wolfson, 298 AD2d 224 (1<sup>st</sup> Dept 2002); Kuo Po Trading Co., Inc. v. Tsung Tsin Association, Inc., 273 AD2d 111 (1<sup>st</sup> Dept 2000).

Accordingly, it is hereby

ORDERED that plaintiff's motion for a Yellowstone injunction is granted and the expiration of the cure period contained in defendant's Notice of Default Under Lease dated September 20, 2010, is stayed and tolled, and defendant, its employees, agents, servants, representatives and all other persons acting on its behalf, are restrained and enjoined from taking any action to terminate plaintiff's lease, from commencing any action or proceeding to obtain

possession of the premises, and from otherwise attempting to gain possession of the premises;  
and it is further

ORDERED that if defendant has not already done so, it shall serve and file an answer  
within 10 days of the date of this decision and order; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on March  
31, 2011 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

The court is notifying the parties by mailing copies of this decision and order.

DATED: March 16 2011

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**  
MAR 21 2011  
NEW YORK  
COUNTY CLERK'S OFFICE