SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

SCAN

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x

SG AUTO BODY, LLC,

Plaintiff,

-against-

T & L SALSONE CORP.,

Defendant.

----------x

TRIAL/IAS PART: 20
NASSAU COUNTY

Index No: 002220-11
Motion Seq. No: 1
Submission Date: 3/17/11

Papers Read on this Motion:

Order to Show Cause, Affidavit in Support and Exhibits.....x
Affirmation in Support and Exhibits.....x
Affidavit in Support.....x
Memorandum of Law in Support.....x
Affidavits in Opposition (2) and Exhibits.....x

This matter is before the court on the Order to Show Cause filed by Plaintiff SG Auto Body LLC ("Plaintiff") on February 14, 2011 and submitted on March 17, 2011. For the reasons set forth below, the Court grants Plaintiff's Order to Show Cause to the extent that the Court directs that the temporary restraining order issued by the Court on February 14, 2011 shall remain in effect, pending further court order, on the conditions that Plaintiff post a bond in the sum of $25,000 within thirty (30) days of the date of this Order and that Plaintiff continue to pay rent timely to Defendant.

BACKGROUND

A. Relief Sought

Plaintiff moves for a Order preliminarily enjoining Defendant T & L Salsone Corp. ("Defendant"), the owner of the premises ("Premises") located at 305 Rockaway Avenue, Valley Stream, New York 1) from declaring the Agreement of Lease ("Lease") dated

December 20, 2005 to have expired on December 19, 2010; 2) from declaring Plaintiff a holdover as of December 19, 2010; 3) from terminating any and all right, title and interest of Plaintiff in the Lease and from terminating the Lease; and 4) from proceeding to remove Plaintiff from possession of the Premises, *i.e.*, a "Yellowstone Injunction."

Defendant opposes Plaintiff's application.

B. The Parties' History

The Verified Complaint ("Complaint"), filed on February 14, 2011, alleges as follows:

Plaintiff is a New York limited liability company engaged in the business of auto body and collision repair with its sole place of business at the Premises. Defendant is a New York corporation engaged in the business of owing and leasing the Premises.

On December 20, 2005, Plaintiff purchased from Defendant an auto body and collision repair business ("Business") that operated at the Premises, along with the related Business assets, including good will. The contract regarding this purchase was subject to and conditioned on Plaintiff executing the Lease which had an initial term ("Initial Term") of five (5) years commencing December 20, 2005 and an option to renew for five (5) additional years ("Renewal Term").

Paragraph 5 of the Lease (Ex. A to Russo Aff. in Supp.) ("Renewal Provision") provides as follows:

> Provided Tenant is not in substantial default of any of the material terms and conditions of this Lease, Tenant shall have the option to renew this Lease for a period of five (5) additional years after the expiration of its original term, on the terms and conditions of this Lease, except that the rental shall be at the rate per annum as set forth on Schedule "A" hereto and subject to Paragraph "8" hereof. In order to exercise the option to renew, Tenant must give Landlord written notice of intention to exercise the renewal option no later than nine (9) months prior to the expiration of the initial term of this Lease.

Throughout the Initial Term, Plaintiff paid all required rent and otherwise complied with its obligations under the Lease. In addition, Plaintiff enhanced the goodwill of the Business and significantly increased its revenue. In 2007, 2009 and 2010, Plaintiff spent over $40,000 making improvements ("Improvements") to the Business, including but not limited to the installation of a new sprinkler system and the installation of additional exterior lightning. Defendant was aware

of and consented to the Improvements.

Since the commencement of the Initial Lease term, Plaintiff repeatedly advised Defendant of its intention to remain at the Premises beyond the Initial Lease term, and requested that Defendant either sell the Premises to Plaintiff or extend the Lease for a total of ten (10) years beyond the Initial Lease term. During these conversations, Defendant assured Plaintiff that the Lease would be extended beyond the Renewal Term and that Defendant did not intend to terminate Plaintiff's tenancy or retake the Premises.

Between February of 2010 and January of 2011, Albert Kemperle ("Kemperle"), a mutual friend and business associate of Plaintiff and Defendant who served as an intermediary between the parties, spoke repeatedly with Anthony Salsone ("Salsone"), Defendant's Principal, regarding Plaintiff's desire to purchase the Premises or renew the Lease. In February, March and April of 2010, Salsone advised Kemperle that he did not wish to sell the Premises at that time, but would extend the Lease for the Renewal Term. The Complaint describes similar conversations in April and June of 2010 reflecting Salsone's assurances to Salvatore Russo ("Russo"), a member of Plaintiff, that he would extend the Lease for the Renewal Term.

On or about December 1, 2010, Plaintiff paid to Defendant rent for the period from December 1 to December 30, 2010 and Defendant accepted that payment. On December 22, 2010, Salsone advised Russo that Plaintiff had failed to provide Defendant with timely written notice of its intention to renew the lease. On December 22, 2010 Plaintiff's counsel confirmed to Defendant, in writing, that Plaintiff exercised its option to renew the Lease. On December 23, 2010, Salsone advised Plaintiff that he should send him the written notice of renewal, "not 'get lawyers involved,'" (Compl. at ¶ 28) and they would speak after the holidays. On December 23, 2010, Plaintiff sent to Defendant a written notice of renewal as directed.

On December 29, 2010, Defendant's counsel advised Plaintiff's counsel by letter that Plaintiff had not provided timely written notice of its intention to renew the Lease but that Defendant was willing to discuss the matter further. In or about the first week of January of 2011, Plaintiff spoke with Defendant regarding the terms of a Lease renewal at which time Defendant advised Plaintiff that the rent for the renewal period would be "double or nothing"

(Compl. at ¶ 31). On or about January 7, 2011, Plaintiff paid to Defendant rent for the period of January 1 through January 31, 2011 ("January Rent Check") at the increased rent provided in the Lease for the first year of the Renewal Term.

On or about January 11, 2011, Defendant's counsel requested that Plaintiff make an offer for the terms of a lease renewal and extension agreement. On January 14, 2011, Plaintiff's counsel advised Defendant of the increased rent that it was already paying, but expressed its willingness to extend the Lease for a period of ten (10) years with a higher rent and annual rent increases. By letter dated January 31, 2011, Defendant's counsel advised Plaintiff that 1) Defendant would not extend the Lease; and 2) Plaintiff was a holdover. Defendant also demanded that Plaintiff quit the Premises by February 14, 2011 and returned the January Rent Check.

On or about February 4, 2011, Plaintiff paid rent for the period from February 1 through February 28, 2011 ("February Rent Check") at the increased rate provided in the Lease for the Renewal Period. By letter dated February 8, 2011, Defendant advised Plaintiff that 1) it considered the Lease to have expired on December 19, 2010; and 2) Plaintiff was subject to removal from the Premises as a holdover by summary proceeding which would be commenced after February 14, 2011 if Plaintiff had not vacated the Premises by that time. In addition, Defendant returned the February Rent Check to Plaintiff. Plaintiff deposited the January and February Rent Checks in escrow, and intends to continue to deposit rent payments in escrow pending a determination of this motion. Plaintiff seeks a judgment declaring that Plaintiff effectively exercised its option to renew the Lease.

On February 14, 2011, following a conference with the Court and with the agreement of counsel for the parties, the Court issued a temporary restraining order ("TRO"). The Court directed that, pending the hearing and determination of this motion, the Defendant is temporarily restrained 1) from declaring the Lease to have expired on December 19, 2010; 2) from declaring Plaintiff a holdover as of December 19, 2010; 3) from terminating any and all right, title and interest of Plaintiff in the Lease and from terminating the Lease; and 4) from proceeding to remove Plaintiff from possession of the Premises on the condition that Plaintiff shall pay, as due, the rent provided for in the Lease for the option period. Plaintiff may pay the rent by delivery to

Defendant's counsel. Receipt and retention of the foregoing rent shall not be a bar to Defendant commencing a holdover proceeding in the event that the Court ultimately renders a decision in favor of Defendant.

In his Affidavit in Support, Russo affirms the truth of the allegations in the Complaint and provides copies of the correspondence to which the Complaint refers. Russo avers that Plaintiff did not provide Defendant with the required written notice of its intention to renew based on its "honest belief that it was unnecessary in view of the many times that I verbally informed [Salsone] of plaintiff's intention to remain in possession of the Premises beyond the expiration of the [Initial Term], the substantial capital improvements that plaintiff made with defendant's knowledge and consent, and in view of [Salsone's] many representations to me that I should not worry, and that the defendant would extend the lease for an additional five years beyond the five year option period 'when the time came'" (Russo Aff. in Supp. at ¶ 42). Russo affirms that, without the requested relief, Plaintiff will suffer a substantial forfeiture in the loss of the Business assets purchased from Defendant, including good will and the value of the Improvements.

In his Affidavit in Support, Kemperle affirms that he has had a business and personal relationship with Russo for approximately fifteen (15) years, and with Salsone for approximately thirty five (35) years. He confirms the conversations with Salsone, as outlined in the Complaint, during which Salsone assured Kemperle that he would extend the Lease term.

In his Affidavit in Opposition, Salsone, the sole officer and stockholder of Defendant, affirms as follows:

Salsone was personally involved in all phases of the execution and negotiation of the Lease. Salsone disputes Plaintiff's description of the conversations ("Conversations") between Salsone and Russo. Salsone affirms that the Conversations related only to Russo's desire to purchase the Premises, or another property near the Premises. At all times, Salsone made it clear to Russo that Defendant did not intend to sell the Premises, and Salsone notes that paragraph 60 of the Lease provided the tenant with the right of first refusal if Defendant obtained a bona fide offer for the purchase of the Premises.

Salsone submits, further, that the Conversations establish Russo's knowledge of the

requirement that he exercise his right to renew in writing. With respect to the Improvements, Salsone affirms that Plaintiff completed those Improvements to cure violations ("Violations") issued by the Office of the Nassau County Fire Commission, Officer of Fire Marshal ("Fire Marshal"). Plaintiff's failure to cure these Violations would have constituted a breach of the Lease.

In his Affidavit in Opposition, counsel for Defendant discusses several provisions of the Lease, including paragraphs 24 and 43 which provide as follows:

> Tenant shall keep and maintain the Premises in compliance with all applicable federal, State and local laws, rules, regulations, ordinances, guidelines, codes, permits and administrative or judicial orders relating to Tenant's use of the premises now or hereafter in effect (collectively "Laws"). Tenant agrees at all times to comply fully, at Tenant's own cost and expense, and to cause all employees, agents, invitees, licensees, contractors and any other person occupying or present on the premises to comply with all Laws. Tenant further agrees, at its own cost and expense, to procure all variances, if any, which may be required for the legal conduct of Tenant's business at the demises premises.
>
> Landlord shall not be obligated to make repairs, replacements or improvements of any kind upon the demised premises, or upon any equipment, facilities or fixtures contained therein.

Counsel for Defendant argues that the requested relief would exceed the purpose of a "Yellowstone Injunction" by extending the time frame for the written notice of intent to renew, thereby impermissibly rewriting the Lease.

Defendant submits, further, that Plaintiff's reliance on the Improvements in support of its application is misplaced, as Plaintiff was required, under the Lease, to perform those Improvements which consisted of repairs for which Plaintiff was solely responsible. By way of example, the Improvements included the sprinkler system which were mandated by, *inter alia*, paragraph 24 of the Lease which obligated the tenant to maintain the Premises in compliance with all applicable laws and regulations. In support, Defendant provides a copy of a Location Log Sheet (Ex. 3 to Swergold Aff. in Opp.) from the Fire Marshal reflecting entries in 1997, 1998, 2000, 2001, 2002, 2008 and 2009 regarding the condition of, and Violations issued in connection with, the sprinkler system.

Counsel for Defendant submits that the only Improvement that "merits any discussion"

(Swergold Aff. in Supp. at ¶ 9) is Plaintiff's claimed expense of $22,000 "to repair structural damage to the Premises caused by a motorist unrelated to plaintiff's business" (Compl. at ¶ 14). Defendant contends, first, that Plaintiff was obligated to make these repairs pursuant to paragraph 43 of the Lease, set forth *supra*. Moreover, as this damage is so clearly within the contemplation of paragraph 43, it is irrelevant that Plaintiff made these repairs with Defendant's knowledge and consent.

Counsel for Defendant notes, further, that the Kemperle Affidavit does not reflect that Kemperle communicated his conversations with Salsone to Russo. Thus, there is no basis for Russo to have relied on Salsone's alleged statements to Kemperle. Moreover, even assuming, *arguendo*, that Kemperle did relay those conversations to Russo, those conversations would have placed Plaintiff on notice of its obligation to notify Defendant formally of its intention to renew.

B. The Parties' Positions

Plaintiff submits that its delay in providing the required written notice of its intention to renew the Lease was attributable to 1) Defendant's repeated assurances that Plaintiff would be permitted to remain in possession of the Premises beyond the Initial Term, 2) the Improvements made by Plaintiff, of which Defendant was aware, and 3) Defendant's repeated representations to Plaintiff that it would extend the Lease. Plaintiff contends that it will suffer a substantial forfeiture without the required relief in light of its investment in the Improvements and potential loss of customers and good will. Finally, Plaintiff argues that renewal of the Lease would not prejudice Defendant because, in light of the numerous conversations between the parties regarding the renewal, Defendant could not reasonably have relied to its detriment on Plaintiff's failure to provide the written notice.

Defendant opposes Plaintiff's application, submitting that the requested relief exceeds the purpose of a "Yellowstone Injunction" by extending the time frame for the written notice of intent to renew, thereby impermissibly rewriting the Lease. Moreover, Plaintiff's reliance on the Improvements in support of its application is misplaced, as Plaintiff was required, under the Lease, to perform those Improvements which consisted of repairs for which Plaintiff was solely responsible. By way of example, the Improvements included the sprinkler system which were mandated by, *inter alia*, paragraph 24 of the Lease which obligated the tenant to maintain the

Premises in compliance with all applicable laws and regulations.

RULING OF THE COURT

The purpose of a *Yellowstone* injunction is to allow a commercial tenant confronted by a threat of termination of a lease to obtain a stay tolling the running of the cure period so that, after a determination of the merits of any action arising under the lease, the tenant may cure the defect and avoid a forfeiture of the leasehold. *First Natl. Stores v. Yellowstone Shopping Ctr.*, 21 N.Y.2d 630 (1968); *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs.*, 93 N.Y.2d 508 (1999); *Hempstead Video, Inc. v. 363 Rockaway Assocs., LLP,* 38 A.D.3d 838 (2d Dept. 2007); *Long Is. Gynecological Servs. v. 1103 Stewart Ave. Assocs. Ltd. Partnership,* 224 A.D.2d 591 (2d Dept. 1996). A tenant seeking *Yellowstone* relief must demonstrate that: (1) it holds a commercial lease; (2) it has received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested 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 short of vacating the premises. *Trump on the Ocean, LLC v. Ash*, 916 N.Y.S.2d 177, 181 (2d Dept. 2011), citing, *inter alia, Graubard Mollen Horowitz Pomeranz & Shapiro, supra*, at 514 (1999). In granting Yellowstone injunctions, courts have generally accepted far less than the showing normally required for the grant of preliminary injunctive relief. *Id.*, citing, *inter alia, Post v. 120 E. End Ave. Corp.*, 62 N.Y.2d 19, 25 (1984).

The Court is mindful of the factual disputes in this case regarding the reasonableness of Plaintiff's position that it should be excused from providing the written notice as required by the Lease, and is somewhat persuaded by Defendant's argument that the Improvements should not excuse Plaintiff's failure to provide the written notice because Defendant was obligated to make those Improvements pursuant to the Lease.

In light of the lesser showing required for a Yellowstone injunction than other preliminary injunctive relief, however, the Court concludes that some injunctive relief is appropriate. Accordingly, the Court grants Plaintiff's application to the extent that the Court directs that the TRO issued on February 14, 2011 shall remain in effect, pending further court

order, on the conditions that Plaintiff post a bond in the sum of $10,000 within thirty (30) days of the date of this Order and that Plaintiff continue to pay rent timely to Defendant.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The court reminds counsel of their required appearance before the Court for a conference on May 26, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

April 1, 2011

HON. TIMOTHY S. DRISCOLL

J.S.C.