

**Magum Footwear LLC v 1407 Broadway Real Estate  
LLC**

2011 NY Slip Op 31269(U)

May 12, 2011

Supreme Court, New York County

Docket Number: 651055/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

MAGNUM FOOTWEAR LLC, et al.,

INDEX No. 651055/11

Plaintiff,

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

-v-

MOTION SEQ. No. 001

1407 BROADWAY REAL ESTATE, LLC,  
Defendant.

MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion for \_\_\_\_\_

PAPERS NUMBERED

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

1+3

Answering Affidavits- Exhibits \_\_\_\_\_

2  
**FILED**

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

CROSS-MOTION: \_\_\_\_\_ YES  NO

MAY 13 2011

Upon the foregoing papers, it is ordered that this motion is:

NEW YORK  
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM

DECISION.

Dated: 5/12/11

Donna M. Mills  
J.S.C.

Check one:  FINAL DISPOSITION

**DONNA M. MILLS, J.S.C.**  
NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

-----X

MAGNUM FOOTWEAR LLC, PRESTIGE HOME  
TEXTILES OF NEW YORK LLC, DYNASTY  
OUTERWEAR LLC, AND PLATINUM DENIM  
HOUSE LLC,

Plaintiffs,

Index No. 651055/11

-against-

1407 BROADWAY REAL ESTATE LLC,

Defendant.

**FILED**

**MAY 13 2011**

-----X

**Donna Mills, J.:**

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiffs Magnus Footwear LLC (Magnus), Textiles of New York LLC (Prestige), Dynasty Outerwear LLC (Dynasty) and Platinum Denim House LLC (Platinum), lessees of defendant 1407 Broadway Real Estate LLC, move for a preliminary injunction, pursuant to *First National Stores, Inc. v Yellowstone Shopping Center, Inc.* (21 NY2d 630 [1968]) (*Yellowstone*).

Plaintiffs each rent portions of defendant's building at 1407 Broadway, New York, New York. Each lease required the tenants to make certain improvements to the leaseholds within nine months of the execution of the leases, approximately March 31, 2010. Plaintiffs were required to produce, for defendant's approval, architectural, mechanical and engineering plans in relation to the improvements. Defendant claims to have received only a preliminary floor plan from Platinum, far less than the

lease required, and no further plans from any other plaintiff.

Pursuant to the leases, each plaintiff was required to post a performance bond for installation expenses expected to cost more than \$50,000. Aff. in Opp., Ex. C, at 22. The requirement for the production of a performance bond applied to all of the improvement projects, as follows: Magnum, \$617,355; Prestige, \$146,700; Dynasty, \$51,865; and Platinum, \$614,295. No bonds were ever provided.

Under the leases, where there is an "Event of Default" which can not, by its nature, be completed within 20 days (such as the improvements called for in the leases), plaintiffs are required to commence remediation of the default within that time, and to "diligently prosecute" such improvements to conclusion. Notice of Motion, Ex. A, Lease, ¶ 9 (b).

Defendant served notices of default on each plaintiff, with a cure period ending April 22, 2011. Opp. to Motion, Ex. B. Each default notice instructed the tenant to perform the improvements, expend the sums called for in the lease (as reflected in the required performance bonds), and submit the plans required by its lease to defendant.

Plaintiffs failed to comply, moving, instead, for a temporary restraining order (TRO) and preliminary injunction, to forestall termination of their leases. On April 21, 2011, plaintiffs obtained a TRO, signed by Justice Charles Ramos of

this court, barring defendant from terminating plaintiffs' leases. However, Justice Ramos conditioned the TRO on plaintiffs' provision, by April 27, 2011, of the performance bonds. Plaintiffs failed to obtain the performance bonds and, as a result, this court vacated the conditional TRO. The time in which to cure plaintiffs' defaults has passed.

In order to receive an injunction under *Yellowstone*, a tenant must establish that:

- (1) it holds a commercial lease;
- (2) it 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.

*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Associates*, 93 NY2d 508, 514 (1999); see also *Trump on the Ocean, LLC v Ash*, 81 AD3d 713 (2d Dept 2011).

"It is well settled that a tenant is not entitled to a *Yellowstone* injunction after the cure period has expired." 166 *Enterprises Corp. v IG Second Generation Partners, L.P.*, 81 AD3d 154, 158 (1st Dept 2011). This is so even if the lease term has not actually been terminated. *KB Gallery, LLC v 875 W. 181 Owners Corp.*, 76 AD3d 909 (1st Dept 2010).

Plaintiffs were not entitled to the protections of a restraining order when they failed to meet the condition for that order. When plaintiffs failed to produce the performance bonds,

as required by the TRO, the period for which to cure the defaults passed. Thus, plaintiffs are not entitled to a preliminary injunction.

The affidavit of Jack Saadia (Saadia), an (or the) officer in all four plaintiff companies, fails to raise any factual issues in this regard. His conclusory claim that the all of the plaintiffs are prepared to proceed with the improvements, and that they have the means to do so, does not satisfy their burden; there is no evidence that plaintiffs can cure their defaults, much less that they actually commenced performance within the cure period necessitated in the absence of a TRO. Evidence that Magnus entered into a preliminary agreement with a design consultant for work on its premises on April 18, two days before the cure period expired (Notice of Motion, Ex. C), does not establish Magnus's performance under the lease. In the absence of any restraining order, Magnus has not shown that it has "diligently" followed up with the initial improvements. As no plaintiff has produced a performance bond, as required by the leases, no plaintiff has begun performance on the improvements.

In short, having failed to act, as required by the leases, during the cure period, and in the absence of a restraining order, none of the plaintiffs is entitled to a *Yellowstone* injunction. Because plaintiffs have produced no credible evidence of a readiness and ability to cure, which, under the

leases, required the production of performance bonds, they would not be entitled to a Yellowstone injunction in any event, even were a TRO still in place.<sup>1</sup>

Accordingly, it is

ORDERED that the motion brought by plaintiffs Magnus Footwear LLC, Prestige Home Textiles of New York LLC, Dynast Outerwear LLC and Platinum Denim House LLC for a preliminary injunction is denied.

Dated: 5/12/11

ENTER:

**FILED**  
MAY 13 2011  
NEW YORK  
COUNTY CLERK'S OFFICE

*[Signature]*  
J.S.C.

MAGNUS FOOTWEAR, LLC

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<sup>1</sup>Saadia, in his affidavit, intimates that Dynasty may, for all he knows, have commenced compliance (Aff., ¶ 29), and that Platinum and Magnus "may not have spent" the full initiation costs required under is lease (*id.*, ¶¶ 6, 38), as if he does not know. These vague statements are disingenuous. If anyone actually knows what these companies are doing, it is Saadia.