

**1842 7th Ave. Delicatessen Corp. v 200 W. 112th St.
Hous. Dev.**

2011 NY Slip Op 31621(U)

June 15, 2011

Supreme Court, New York County

Docket Number: 103019/11

Judge: Judith J. Gische

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

PRESENT: GISCHE
HON. JUDITH J. GISCHE Justice

PART 10

1842 7th Ave DELICATESSON
- v -
200 WEST 112th HOUSE, INC
DEVELOPMENT

INDEX NO. 103019/11
MOTION DATE _____
MOTION SEQ. NO. 001
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 ... | _____ |
| Answering Affidavits — Exhibits _____ | _____ |
| Replying Affidavits _____ | _____ |

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
JUN 16 2011
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

*and preliminary conference
scheduled for July 21, 2011 at 9:30 am*

Dated: JUN 15 2011
_____ HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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: IAS PART 10**

-----X
1842 7th Avenue Delicatessen Corp.,

Plaintiff (s),

-against-

200 West 112th Street Housing Development
Fund Development d/b/a 200 West 112th
Street/ 1842 7th Avenue HDFC Corp.,

Defendant (s).
-----X

DECISION/ ORDER
Index No.: 103019/11
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
JSC

FILED

JUN 16 2011

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

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| Papers | Numbered |
|---|-----------------|
| Pltf's OSC [yellowstone] w/DS affid, exhs, | 1 |
| RSS affirm Rule 202.7[f] | 2 |
| Defs' opp w/EHK affirm, exhs | 3 |
| Defs' opp w/AR affid, exhs | 4 |
| Defs' x/m [3211] w/EHK affirm, exhs | 5 |
| Pltf's reply w/DS affid, exhs | 6 |
| Pltf's opp to x/m w/DS affid, exhs | 7 |
| 2 color and 1 b&w photograph (unattached to pltf's OSC) | 8 |

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action for a declaratory judgment and permanent injunction. Plaintiff is the tenant of defendants pursuant to a lease assignment. There is a separate dispute about whether that lease has expired which is addressed later in this decision.

Presently before the court is plaintiff's order to show cause seeking a "yellowstone" injunction because defendants have served a Ten (10) Day Notice to

Cure alleging certain violations of the lease. Defendants oppose the motion and have separately moved for the preanswer dismissal of this action on the basis that there is another action pending for the same relief and failure to state a cause of action. Since the making of the order to show cause and defendants' cross motion, plaintiff has served (on or about March 28, 2011) an amended verified complaint. The court issued a temporary restraining order ("TRO") on March 14, 2011 which remains in place pending the court's decision on these motions.

Arguments

Plaintiff operates a delicatessen on the ground level of the building located at 1842 7th Avenue, New York, York ("building") and defendants are the landlord. Defendants served a Ten (10) Notice to Cure alleging that plaintiff had "breached and violated PARAGRAPH THIRD of the expired lease between it as assignee and the owner of the subject premises..." The alleged violation is the removal and/or defacing of the brick or stone facing of the exterior of the building by installing a plate glass facing without the defendants' prior consent. The notice to cure highlights another dispute between the parties about whether the lease at issue which commenced September 1, 2003 and ending August 31, 2010 was subject to renewal or, as defendants claim, has expired. That dispute was the subject of a prior Civil Court summary proceeding which was later dismissed by the Hon. Manuel Mendez for reasons set forth in his decision/order dated January 31, 2011. Briefly, the proceeding was dismissed for lack of service.

Plaintiff alleges that it did not violate paragraph 3 of the lease, the lease has not expired and plaintiff has the right to extend it for another 7-10 years, as provided in the

addendum thereto, and even if it did violate a term of its lease, it is willing and financially able to make any cure the court directs. In his sworn affidavit, Derhem Saleh, the president of plaintiff, states that defendants are attempting to "bludgeon Plaintiff" into giving up its "valuable leasehold interest," based on defendants' interpretation of the lease, requiring prior permission to replace the plate glass window. Saleh also states that the injunctive relief is necessary to preserve the status quo until the validity of the notice can be decided.

In a later affidavit, Saleh explains that the plate glass/ store front had to be replaced when it shattered. According to Saleh, he consulted with a contractor who warned him that the existing frame of the door was deteriorated and could not support the replacement glass panes. Although defendants contend there was brick below the old window frame of the store front, Saleh contends the old frame consisted of aluminum fascia backed with plywood. He states that although the appearance of the store window has been changed, the change was necessary. He also states that the change is an improvement and not an alteration as defendants present it to be.

Defendants point out that there is another action pending between the same parties and that this case should be dismissed on the basis of a prior action pending. Whereas this action is for a declaratory judgment that the plaintiff is not in default of its lease obligations (1st cause of action) and a permanent injunction, restraining the defendants from taking any steps to terminate the lease and/or commencing any action based upon the notice to cure (2nd cause of action), the 2010 action is for a declaratory judgment that the plaintiff has a right to an extension/ renewal of the lease (1st cause of action) and injunctive relief restraining the defendant from taking steps to terminate the

lease and/or commencing any action based upon the Ten (10) Day Notice of Termination which was subject of the dismissed summary proceeding before Judge Mendez.

Defendants also contend that plaintiff has failed to meet the requirements for a injunctive relief because Saleh has not addressed any of the elements of such a claim.

Discussion

Defendants' cross motion to dismiss the complaint on the basis of "judge shopping" is denied since the 2010 action is also assigned to this court and there is no indication that plaintiff took any steps to have this case assigned to a different judge. In fact, in the request for judicial intervention, plaintiff identified the 2010 case as being a "related action."

The cross motion is also denied to the extent that defendants allege that the order to show cause is invalid and should be denied solely on the basis of a defective complaint. The defect alleged is that the complaint states a causes of action for a "preliminary injunction" and that a provisional remedy is not a properly stated cause of action. Plaintiff has, however, filed an amended complaint with the court purporting to correct the defect alleged. Since defendants have neither objected to the amended complaint or shown any prejudice, the amendment will be allowed. The complaint, as amended, properly states forth cognizable causes of action for a declaratory judgment and a permanent injunction, effectively rendering this branch of defendants' motion academic.

Pursuant to CPLR 3211[a] [4], a party may move to dismiss one or more causes of action asserted against him on the ground that there is another action pending

between the same parties for the same cause of action in a court of any state or the United States (White Light Productions, Inc. v. On the Scene Productions, Inc., 231 A.D.2d 90 [1st Dept 1997]). The relief sought must be the same or substantially the same and the court has considerable discretion in deciding whether to dismiss an action on the basis of CPLR 3211 [a][4] (Montalvo v. Air Dock Systems, 37 A.D.3d 567 [2nd Dept 2007]).

A careful examination of the complaints in this and the 2010 action reveals that the two actions are not for the same or substantially the same relief. Where here plaintiff seeks a declaratory judgment that it is not in default of its lease obligations (1st cause of action) and a permanent injunction, restraining the defendants from taking any steps to terminate the lease and/or commencing any action based upon the February 22, 2011 notice to cure (2nd cause of action), the 2010 action involves a notice of termination which Judge Mendez determined was not properly served and, therefore, defective. Furthermore, in the 2010 action plaintiff seeks injunctive relief extending the lease. Since the actions are for different relief, defendants' motion for the dismissal of this action based upon CPLR 3211 [a] [4] is denied. Neither side has addressed whether the two actions should be consolidated and, although it appears they should be. Consequently, the court makes no order in that regard at this time.

Defendants contend that plaintiff has not met the pleading requirements necessary to support a motion for a preliminary injunction under CPLR § 6301 et seq. Plaintiff's motion is not, however, for a preliminary injunction, but for a "Yellowstone" injunction. Whereas injunctive relief under Article 63 of the CPLR requires that a party demonstrate a probability of success on the merits, danger of irreparable injury in the

absence of an injunction and a balance of equities in its favor (see CPLR § 6301; Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839 [2005]; Aetna Insurance Co., Inc. v. Capasso, 75 NY2d 860 [1990]; W.T. Grant Co. v. Srogi, 52 NY2d 496 [1981]) a Yellowstone injunction maintains the *status quo* of a commercial tenant when confronted by an imminent threat its lease will be terminated. The underlying purpose of a Yellowstone injunction is to allow the tenant to protect its valuable investment in the leasehold by obtaining a stay. The stay tolls the cure period so that after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the lease (First Natl. Stores v. Yellowstone Shopping Ctr., 21 NY2d 630 [1968]; Post v. 120 East End Avenue Corp., 62 NY2d 19 [1984]; Long Island Gynecological Services v. 1103 Stewart Avenue Associates, 224 AD2d 591 [2nd Dept. 1996]).

In order to obtain a Yellowstone injunction, the tenant must demonstrate 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 Associates, 93 NY2d 508 [1999]; First Natl. Stores v. Yellowstone Shopping Ctr., *supra*). Consequently, the showing that must be made for a Yellowstone injunction is easier to meet and less restrictive than the standard which defendants claim plaintiff must meet (E.C. Electronics, Inc. v. Amblunthorp Holding, Inc., 38 A.D.3d 401 [1st Dept 2007]).

Plaintiff easily meets three of the four elements necessary to obtain a Yellowstone injunction. The landlord has served plaintiff with a notice to cure, the

notice states that if the tenant does not cure the lease violation within the time provided "the Landlord will terminate your tenancy pursuant to the terms of the within Notice...", this action was timely commenced within the cure period, and the tenant states it is prepared and financially able to cure the alleged defaults. The final element – whether the tenant holds a commercial lease – is a core disputed issue which cannot be resolved at this time. However, looking at the addendum to the lease, it appears that plaintiff's factual claim of being entitled to the a 7 - 10 year extension of the lease, is supported by the plain language of that addendum.

Having established its clear right to as Yellowstone injunction, plaintiff's motion is granted. The TRO which the court issued pending this decision is converted to a preliminary injunction. Defendants, their officers, employees, agents, attorneys and all persons on their behalf or in concert with defendants shall not, during the pendency of this action, take any steps to terminate plaintiff's lease and tenancy, commence summary proceedings or disturb in any manner the possession and rights of plaintiff to the premises based upon the Ten (10) Day Notice to Cure dated February 22, 2011 and plaintiff's time to cure any alleged default under the lease, as stated in the Ten (10) Day Notice to Cure is hereby tolled. Neither side has addressed the issue of a bond, therefore, no order is made in that regard (E.C. Electronics, Inc. v. Amblunthorp Holding, Inc., supra).

Since defendants have not answered the amended complaint, their time to do so is extended in the manner provided under CPLR 3211 [f]. In anticipation of issue being joined, the court hereby schedules a **preliminary conference for July 21, 2011 at 9:30 a.m.** in Part 10, 60 Centre Street, Room 232. The parties shall bring all prior orders

with them to the conference.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that plaintiffs' motion is granted; Defendants, their officers, employees, agents, attorneys and all persons on their behalf or in concert with defendants shall not, during the pendency of this action, take any steps to terminate plaintiff's lease and tenancy, commence summary proceedings or disturb in any manner the possession and rights of plaintiff to the premises based upon the Ten (10) Day Notice to Cure dated February 22, 2011 and plaintiff's time to cure any alleged default under the lease, as stated in the Ten (10) Day Notice to Cure is hereby tolled; and it is further

ORDERED that defendants' motion is denied and their time to answer is extended; and it is further


ORDERED that the preliminary conference will be held on July 21, 2011 at 9:30 a.m.; and it is further

ORDERED that any relief not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
June 15, 2011

So Ordered:



Hon. Judith J. Gische, JSC

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JUN 16 2011

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