

<b>Baruch, LLC v 587 Fifth Ave., LLC</b>
2012 NY Slip Op 30067(U)
January 11, 2012
Supreme Court, New York County
Docket Number: 113261/11
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

BARUCH, LLC

Plaintiff,

-v-

587 FIFTH AVENUE, LLC  
c/o SOL GOLDMAN INVESTMENTS, LLC,  
Defendants.

INDEX No. 113261/11

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

MOTION SEQ. No. 001

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

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 143

Answering Affidavits- Exhibits 244

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

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

**FILED**

JAN 13 2012

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

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/11/12

[Signature]  
J.S.C.

Check one: \_\_\_\_\_ FINAL DISPOSITION

NON-FINAL DISPOSITION

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

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BARUCH, LLC,

Plaintiff,

- against -

587 FIFTH AVENUE, LLC  
c/o SOL GOLDMAN INVESTMENTS, LLC,  
Defendant.  
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INDEX NO.  
113261/11

DECISION/ORDER

**FILED**

JAN 13 2012

DONNA MILLS, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff, Baruch, LLC, ("Plaintiff") moves for an Order: (i) granting Plaintiff a temporary restraining order and preliminary injunction (a Yellowstone Injunction) tolling and enjoining the running of the cure period; (ii) enjoining Defendant 587 Fifth Avenue, LLC from terminating the Lease and/or otherwise commencing eviction proceedings pending the determination of this action; and (iii) enjoining Defendant from interfering with Plaintiff's right to use and occupancy and quiet enjoyment of the subject premises.

Plaintiff is the net lessee of 587 Fifth Avenue, New York, New York, pursuant to a Lease Agreement dated as of March 21, 1980, between Empire Associates Realty Co., as landlord (Defendant's predecessor-in-interest) and Seacom Inc., (as Plaintiff's predecessor-in-interest).

On or about October 31, 2011, Plaintiff received a Twenty (20) Day Notice to Cure signed by Louisa Little, Vice President of Defendant. Attached to the Notice to Cure was a New York City Criminal Court Summons, as well as a copy of a Department of Buildings violation. The Notice to Cure alleges that these open violations constitute a default under the terms of the Lease, and instructs Plaintiff to correct the violations by November 30, 2011.

First, Defendant alleges that Plaintiff is in violation of the Lease due to the issuance

of the aforementioned Criminal Court Summons. Plaintiff contends that the violation was caused by a tenant in the Building, and not them. As such, Plaintiff annexes to its moving papers a Notice to Cure it sent to the tenant, Jena and Alex Fine Jewelry Manufacturing and Consultant, Inc., to respond to the summons and to cure the violation.

Defendant then argues that Plaintiff is in violation of the Lease due to the Department of Buildings Violation. This violation is regarding an unused freight elevator that was in the Building prior to Plaintiff having taken possession.

Yellowstone injunction forestalls the cancellation of a lease to afford the tenant an opportunity to obtain a judicial determination of its breach, the measures necessary to cure it, and those required to bring the tenant in future compliance with the terms of the lease (see Waldbaum, Inc. v. Fifth Ave. of Long Is. Realty Assocs., 85 N.Y.2d 600, 606 [1996]). A tenant seeking Yellowstone relief must demonstrate that: (1) it holds a commercial lease, (2) it has received from the landlord a notice of default, a notice to cure, or a concrete threat to terminate the lease, (3) the application for a temporary restraining order was made prior to the termination of the lease, and (4) it has the desire and ability to cure the alleged default by any means short of vacating the premises (see Long Is. Gynecological Servs. v. 1103 Stewart Ave. Assocs. Ltd. Partnership, 224 A.D.2d 591, 593 [2<sup>nd</sup> Dept 1996]). Since a Yellowstone injunction is designed to avoid the tenant's forfeiture of its valuable leasehold interest while it challenges the propriety of the landlord's default notice, courts "accept[ed] far less than the normal showing required for preliminary injunctive relief" ( Heavy Cream v. Kurtz, 146 A.D.2d 672, 673 [2<sup>nd</sup> Dept 1989]).

This Court finds that the Plaintiff net lessee amply demonstrated its entitlement to a Yellowstone injunction by satisfying the requisite criteria for such an injunction. Specifically, the plaintiff established that: (1) it holds a commercial lease on the premises, (2) it was served by the defendant with a notice to cure a lengthy list of allegedly defective

conditions on the property, (3) it timely moved for injunctive relief prior to the expiration of the cure period and termination of the lease, and (4) it has the desire and ability to cure its alleged default by any means short of vacating the premises (see generally, Long Is. Gynecological Servs. v 1103 Stewart Ave. Assocs., 224 AD2d 591, supra; 225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp., 211 AD2d 420 [1<sup>st</sup> Dept 1995]). With regard to the last criterion, the plaintiff satisfied its burden by indicating in its motion papers that it was willing to repair the defective conditions found by the City Agencies and by providing proof of the substantial efforts it had already made in addressing the majority of conditions listed in the notice to cure (see, Manhattan Parking Sys.-Serv. Corp. v House Owners Corp., 211 AD2d 534 [1<sup>st</sup> Dept 1995]); 225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp., supra; Jemaltown of 125th St. v Betesh/Park Seen Realty Assocs., 115 AD2d 381 [1<sup>st</sup> Dept 1985]). What is important is that plaintiff immediately took substantial steps to cure the violation and is actively working toward that end ( see TSI W. 14, Inc. v. Samson Assoc., LLC, 8 A.D.3d 51, [1<sup>st</sup> Dept 2004]). This Court is satisfied that plaintiff is acting as promptly given the nature of the hazard and the work required to remedy it.

Due deliberation having been had, and it appearing to this court that a cause of action exists in favor of the plaintiff and against the defendants and that the plaintiff is entitled to a preliminary injunction on the ground that the plaintiff has demanded and would be entitled to a judgment restraining the defendants from the commission or continuance of an act, which if committed or continued during the pendency of the action, would produce injury to the plaintiff, as set forth in the aforesaid decision, it is

ORDERED that defendants, their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendants, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision

or control of defendants or otherwise, any of the following acts:

Terminating the Lease with Plaintiff and/or otherwise commencing eviction proceedings pending the determination of the within action and Plaintiff's right to the use and quiet enjoyment of the premises; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre Street, on 2/24, 2012, at 10<sup>15</sup> AM.

Dated:

ENTER:

*DM*

J.S.C.

**DONNA M. MILLS, J.S.C.**

**FILED**

JAN 13 2012

NEW YORK  
COUNTY CLERK'S OFFICE