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

**HON. TIMOTHY S. DRISCOLL**
**Justice Supreme Court**

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**NADIA NIMIR D/B/A FULTON WIRELESS,**

**Plaintiff,**

**-against-**

**ATN FULTON, LLC,**

**Defendant.**

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**TRIAL/IAS PART: 16**
**NASSAU COUNTY**

**Index No: 017995-11**
**Motion Seq. No. 1**
**Submission Date: 2/17/12**

**Papers Read on this Motion:**

**Order to Show Cause, Affidavit in Support,**
**Affirmation in Support and Exhibits.....x**
**Memorandum of Law in Support.....x**
**Summons with Notice.....x**
**Affirmation in Opposition.....x**
**Affidavit in Opposition.....x**

This matter is before the court on the Order to Show Cause filed by Plaintiff Nadia Nimir d/b/a Fulton Wireless ("Plaintiff") on December 28, 2011. By Order dated January 23, 2012 ("Prior Order"), the Court reserved decision on the Order to Show Cause and provided Defendant ATN Fulton, LLC ("Defendant") with the opportunity to provide the Court, and opposing counsel, with a supplemental submission from an individual with personal knowledge of the relevant facts. Defendant provided that supplemental submission, specifically an Affidavit in Opposition of Mohammed Siddiqui ("Siddiqui"), the Managing Member of Defendant ATN Fulton, LLC, and the motion was submitted on February 17, 2012. For the reasons set forth below, the Court denies the Order to Show Cause and vacates the temporary restraining order

issued on December 28, 2011.

BACKGROUND

A. Relief Sought

Plaintiff seeks an Order awarding injunctive relief in the form of an Order staying the cure period set forth in the Notice and enjoining the Defendant ATN Fulton, LLC ("Defendant"), its agents, servants and employees, and all persons acting on its behalf, pending the hearing and determination of this action, from commencing any summary or other proceeding to terminate or cancel the lease agreement ("Lease") of Plaintiff with respect to the premises ("Premises") located at 626 Fulton Avenue, Hempstead, New York, including but not limited to terminating or canceling Plaintiff's leasehold interest, or the Lease, based upon the Notice of Default dated December 9, 2011 and served on or about December 15, 2011, or the purported defaults alleged therein. Plaintiff seeks an Order specifically prohibiting Defendant from 1) interfering with Plaintiff's right of possession of the Premises; 2) commencing a summary holdover or other proceeding to recover possession of the Premises; 3) commencing any action to declare Plaintiff's leasehold interests in the Premises canceled or terminated; and 4) taking any other action to terminate or cancel Plaintiff's leasehold interests based upon the Notice of Default. Plaintiff also seeks an Order staying and tolling Plaintiff's time to cure the alleged defaults claimed in the Notice of Default pending the hearing and determination by this Court of Plaintiff's application.

Defendant opposes Plaintiff's application

B. The Parties' History

The parties' history is set forth in detail in the Prior Order, and the Prior Order is incorporated by reference as if set forth in full herein. As noted in the Prior Order, Plaintiff alleges that Defendant breached the lease agreement regarding Premises leased to Plaintiff by Defendant who purchased the Premises from the Former Landlord. Plaintiff alleges, *inter alia*, that 1) it has regularly tendered rent payments, but Defendant has intentionally refused to negotiate all of the tendered rent checks; 2) Defendant has improperly alleged that Plaintiff violated the Lease and is now claiming, for the first time, that Plaintiff also owes payment for its share of the increase in the real estate taxes from the base year of the Lease for the period of

2007-2010 despite Plaintiff's claim that it paid the Former Landlord the sums requested by him; 3) on or about December 17, 2011, Plaintiff received a Fifteen (15) Day Notice to Tenant ("Notice") which claimed, erroneously, that Plaintiff owed rent, taxes and common area maintenance charges in the sum of $60,391.90; 4) prior to his receipt of the Notice, Plaintiff attempted in September of 2011 to resolve all outstanding issues by tendering a check to Defendant in the sum of $17,071.00 which Defendant refused to accept; and 5) prior to sending the Notice, Defendant never mentioned that any tax arrears were due and owing.

In his Affidavit in Opposition, Siddiqui affirms that Defendant purchased the Premises from the Former Landlord on or about February 8, 2011. Following that purchase, Defendant reviewed the books and records of the Former Landlord which reflect that Plaintiff failed to pay the proper rent for the Premises.

Siddiqui affirms that 1) Plaintiff failed to pay the base rent of $2,814.20 for March, April, June, August, September, October, November and December of 2011, and the base rent of $2,954.91 for January of 2012; 2) Plaintiff failed to pay the correct amount of added rent in the form of real estate tax payment pursuant to paragraph 44 of the Lease which requires Plaintiff to pay 9.85% of the tax; 3) Plaintiff failed to pay common area maintenance charges in the sum of $101.85 per month for March through December of 2011, and January of 2012; and 4) Plaintiff owes late charges for every month for which the rent is not paid in full, which includes March of 2011 through January of 2012.

Siddiqui affirms, further, that Defendant previously retained counsel to collect the proper rent due, and counsel attempted to negotiate a settlement regarding the parties' dispute. Plaintiff, however, tendered payment that was incorrect and, therefore, Defendant rejected the payment. Defendant then retained current counsel, obtained the tax bills going back to 2007 and calculated the added rent due based on the tax clause in the Lease. Based on Defendant's calculations, Plaintiff owes a monthly tax payment of $1,026.87 for the year 2011. In addition, Plaintiff owes monthly common maintenance charges of $101.85. Plaintiff has not tendered the proper payment for these obligations.

Siddiqui provides detailed calculations to explain Plaintiff's tax obligations in 2007, 2008, 2009, 2010 and 2011, and affirms to the payments made by Plaintiff which did not meet its

obligations. Siddiqui affirms that Plaintiff owes the following tax payments for the years 2007 through 2010: $7,968.17, $5,651.30, $5,869.94 and $6,480.02. In addition, Plaintiff owes total common area maintenance charges of $1,120.35 for March 2011 through January of 2012, as well as late fees of $3,236.32 for 2011 and 2012.

Siddiqui affirms that in 2011, Plaintiff made four (4) payments of $500 towards its tax obligations which left a 2011 balance of $10,322.42. In addition, Defendant accepted two payments in the sum of $3,414.00 from Plaintiff in 2011, on the advice of prior counsel. Defendant has received no other checks from Plaintiff during the year 2011.

Siddiqui avers that the Notice served on Plaintiff (Ex. B to Nimir Aff. in Supp.) included every tax bill from 2007 through 2011 which showed the full amount of taxes levied on the Premises. Siddiqui denies ever intentionally refusing to accept the correct amount of rent, and affirms that Defendant has complied with its obligations under the Lease, and seeks to enforce its remedies therein. Moreover, the Lease contains a no waiver clause that permits the landlord to accept less than the rent due without waiving the full amount due and owing. Siddiqui affirms that Defendant is simply seeking to collect the correct rent, and denies that it is trying to improperly terminate Plaintiff's lease.

Paragraph 24 of the Lease, titled "No Waiver," provides in pertinent part as follows:

> ...The receipt by Owner of rent and/or additional rent with knowledge of the breach of any covenant of this lease shall not be deemed a waiver of such breach and no provision of this lease shall be deemed to have been waived by Owner unless such waiver be in writing signed by the Owner. No payment by Tenant or receipt by Owner of a lesser amount than the monthly rent herein stipulated shall be deemed to be other than on account of the earliest stipulated rent, nor shall any endorsement or statement of any check or any letter accompanying any check or payment as rent be deemed an accord and satisfaction, and Owner may accept such check or payment without prejudice to Owner's right to recover the balance of such rent or pursue any other remedy in this lease provided...

Paragraph 43 of the Lease provides as follows:

> Tenant waives his right to bring a declaratory judgment action with respect to any provision of this lease, or with respect to any notice pursuant to the provisions of this lease, and expressly agrees not to seek injunctive relief which would stay, extend or otherwise toll any of the time limitations or provisions of this lease, or any notice sent pursuant thereto. Any breach of this paragraph shall constitute a

violation of a substantial obligation of the tenancy, and shall be grounds for the immediate termination of this Lease. It is further agreed that in the event injunctive relief is sought, or if a "Yellowstone" injunction (First National Stores, Inc. v. Yellowstone Shopping Centers, Inc., 21 N.Y.2d 630) is sought, such relief shall be denied, and Landlord shall be entitled to recover the costs of opposing such application or action, including its attorneys' fees actually incurred. The Landlord may not cancel this lease pursuant to the bankruptcy clause as long as the Tenant is not in default in the payment of his monthly rent.

C. The Parties' Positions

Plaintiff submits that it has the right to seek a "Yellowstone" injunction in light of its efforts to comply with the Lease, and Defendant's breach of the Lease by refusing to accept Plaintiff's rent and real estate tax payments, and seeking payment of Plaintiff's proportionate share of real estate taxes for the years 2007-2010 despite the Prior Landlord's acceptance of similar payments in full satisfaction of Plaintiff's obligations. Plaintiff contends, further, that Defendant has breached its covenant of good faith and fair dealing by alleging violations of the Lease that do not exist, or were created by Defendant's own improper conduct. Finally, Plaintiff contends that paragraph 43 of the Lease, which provides *inter alia* that Plaintiff agrees not to seek injunctive relief that would stay, extend or toll the time limitations or provisions of the Lease, is unconscionable.

Defendant opposes Plaintiff's application submitting that 1) pursuant to paragraph 43 of the Lease, Plaintiff has waived its right to seek injunctive relief; 2) Plaintiff's claim that Defendant has breached the Lease by refusing to accept the full rent is untrue, and it is Plaintiff who has miscalculated the amount of rent due and tendered insufficient sums; and 3) Defendant has not breached its covenant of good faith and fair dealing; rather, Defendant is seeking to enforce its remedies under the Lease.

RULING OF THE COURT

A. Preliminary Injunction Standards

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant

demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. *See White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

B. Yellowstone Injunction

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 a notice of default; (3) its application for a temporary restraining order was made prior to expiration of the cure period and 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 Hempstead Video, Inc. v. 363 Rockaway Assocs., LLP,*

38 A.D.3d at 839; *Mayfair Super Mkts., Inc. v. Serota,* 262 A.D.2d 461, 461-462 (2d Dept. 1999).

C. Contract Interpretation

When parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms, and this rule is applied with special force in the context of real property transactions, where commercial certainty is a paramount concern, and where the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length. *Riverside South Planning Corp. v. CRP/Extell Riverside, L.P.*, 13 N.Y.3d 398, 403 (2009), quoting *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004) (internal quotation marks, ellipses and citations omitted). Courts may not be construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing. *Id.* at 404, quoting *Reiss v. Financial Performance Corp.*, 97 N.Y.2d 195, 199 (2001) (internal quotation marks and citation omitted).

D. Application of these Principles to the Instant Action

Even assuming *arguendo* the unenforceability of paragraph 43 of the Lease which prohibits Plaintiff from seeking a Yellowstone Injunction, the Court nonetheless denies Plaintiff's application for a Yellowstone Injunction based on the Court's conclusion that Plaintiff has not established that it has the desire and ability to cure the alleged default by any means short of vacating the premises. Plaintiff affirms that "based upon the fact that the Defendant is now suddenly alleging tax arrears going back almost five (5) years, I will certainly be unable to nor should I have to 'cure' any alleged default prior to the date set forth in the [Notice]" (Nimir Aff. in Supp. at ¶ 7). Thus, notwithstanding the clear provisions of the Lease requiring Plaintiff to make rent payments representing a portion of the tax obligations on the Premises, and Defendant's production of tax documentation supporting its affirmation regarding the payments owed, Plaintiff persists in its position that it does not owe the payments at issue. Moreover, Plaintiff has not provided an affidavit from the Former Landlord, or documentation, attesting to the Former Landlord's alleged acceptance of reduced payments, or the accuracy of Plaintiff's

assertion, *e.g.*, that the Former Landlord make a particular calculation of Plaintiff's tax obligations that differs from Defendant's calculation (*id.* at ¶ 8). Thus, Plaintiff has not demonstrated the desire and ability to cure the alleged default, and the Court denies its application for a Yellowstone Injunction.

The Court denies Plaintiff's remaining applications based on the Court's conclusion that Plaintiff has not demonstrated a likelihood of success on the merits. The parties dispute the payments owed, and the significance of Defendant's acceptance of certain payments. The Lease specifically provides, however, that Defendant's acceptance of a rent payment is not a waiver of any breach by the Plaintiff, and is without prejudice to Defendant's right to recover the balance owed, or pursue its other remedies. Moreover, Defendant, unlike Plaintiff, has provided underlying documentation, which was included with the Notice, supporting its position as to the amount of added rent in the form of real estate taxes owed by Plaintiff pursuant to the Lease.

In light of the foregoing, the Court denies the Order to Show Cause in its entirety and vacates the temporary restraining order. The Court also, in its discretion, denies at this juncture Defendant's application for counsel fees pursuant to paragraph 43 of the Lease.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on March 29, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY
February 24, 2012

HON. TIMOTHY S. DRISCOLL
J.S.C.