

<b>Shoe Mania V LLC v SLG 331 Madison LLC</b>
2012 NY Slip Op 33661(U)
May 9, 2012
Supreme Court, New York County
Docket Number: 151961/12
Judge: Ellen M. Coin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. ELLEN M. COIN

PRESENT: \_\_\_\_\_
Justice

PART 63

Shoe Mania v

INDEX NO. 151961/12

-v-

MOTION DATE 5/9/12

MOTION SEQ. NO. 001

SLG 331 Madison, LLC

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

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

MOTION AND CROSS-MOTION(S) ARE
DECIDED IN ACCORDANCE WITH ANNEXED
DECISION AND ORDER.

This constitutes the decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/9/12

\_\_\_\_\_, J.S.C.
HON. ELLEN M. COIN

- 1. CHECK ONE: ... CASE DISPOSED ... NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ... MOTION IS: ... GRANTED ... DENIED ... GRANTED IN PART ... OTHER
3. CHECK IF APPROPRIATE: ... SETTLE ORDER ... SUBMIT ORDER
DO NOT POST ... FIDUCIARY APPOINTMENT ... REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 63

----- X

SHOE MANIA V LLC

Plaintiff,

Index Number 151961/2012

Submission Date May 9, 2012

Mot. Seq. No. 001

**DECISION and ORDER**

-against-

SLG 331 Madison LLC,

Defendant.

-----X

**For Plaintiff :**

Law Offices of Santo Golino  
46 Trinity Place, 1<sup>st</sup> Floor  
New York, New York 10003  
(212) 344-9300

**For Defendant:**

Stempel Bennett Claman & Hochberg, P.C.  
By Joelle B. Taub  
675 Third Avenue  
New York, New York 10017  
(212) 681-6500

Papers considered in review of this motion by order to show cause:

<b>Papers</b>	<b>Numbered</b>
Order to Show Cause and Affidavits Annexed.....	<u>1</u>
Memo of Law in Supp.....	<u>2</u>
Affirm. in Opposition.....	<u>3</u>
Notice of Cross-Mot.....	<u>4</u>
Affirm. in Reply and in Further Opp. to Cross-Mot.....	<u>5</u>

---

**ELLEN M. COIN, J.:**

This is an action for injunctive relief. Plaintiff tenant Shoe Mania V, LLC moves for a *Yellowstone* injunction staying and tolling the cure period in a Notice to Cure dated April 4, 2012 until a reasonable time after this Court has determined whether such a default validly exists, and enjoining defendant landlord SLG 331 Madison LLC from terminating plaintiff's lease or commencing an action or proceeding to recover possession based upon the Notice to Cure.

Defendant landlord cross-moves to dismiss this action for failure to state a cause of action pursuant to CPLR 3211(a)(1) and (7).

On August 1, 1999, plaintiff entered into a lease of the store space and basement at 331 Madison Avenue in the County of New York with defendant's predecessor in interest, 331 Madison Avenue Associates. The lease was modified on October 17, 2008, reflecting its assignment to the defendant landlord and containing certain additional provisions. On March 22, 2012, pursuant to paragraph 31 of the lease between the parties, the landlord applied against the rent arrears the letter of credit that was in place as a security deposit in the amount of \$120,000.00, which left a balance of the then-existing arrears totaling \$89,713.86. On April 4, 2012, the landlord notified the tenant that it was required to replenish its security amount of \$120,000.00 pursuant to Section 2, paragraph (c) of the modification agreement and it had fifteen days to cure pursuant to paragraph 17(1) of the original lease.

In essence plaintiff admits that it has not fulfilled the lease conditions requiring it to replenish the security deposit, but alleges that it has taken steps to do so and needs sixty days to cure.

**Discussion.**

The party requesting a *Yellowstone* injunction 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 Ave. Assoc.*, 93 NY 2d 508, 514 [1999]).

There is no dispute as to the first three factors. While defendant disputes plaintiff's efforts to cure, it is the very purpose of a *Yellowstone* injunction to afford the tenant an opportunity to contest the alleged violation in the notice to cure while preserving the tenant's right to cure in the event that the tenant is wrong and a violation is found to exist. (*Post v. 120 E. End Ave. Corp.*, 62 NY2d 19, 25 [1986]; *Stuart v D & D Assoc.*, 160 AD2d 547, 548 [1<sup>st</sup> Dept 1990]).

Here plaintiff is requesting a reasonable time of sixty days in which to secure another letter of credit to replenish the security deposit. Defendant landlord's argument that the Court would be rewriting the terms of the lease agreement by affording tenant more than fifteen days to cure is unpersuasive. Section 2(c) of the modification agreement only specifies the time period of thirty days within which the letter of credit must be renewed, but does not provide a rigid deadline for replenishing the letter of credit that was cashed for reasons unrelated to failure to renew. Because Section 2(c) is a provision in the modification agreement that was put in place nine years after the original lease, which contains a fifteen-day cure period, and is specific to the use of a letter of credit as a security deposit, Section 2(c) is the governing clause. (*See 425 Park Avenue Co. v 425 Park Avenue Ground Lessee L.P.*, 69 A.D.3d 467, 468 [1<sup>st</sup> Dept 2010]). Accordingly, plaintiff is entitled to a *Yellowstone* injunction

Defendant contends that thus far plaintiff has failed to promptly proceed to cure its defaults, at times necessitating proceedings in the housing court, and therefore requests that the Court impose an undertaking in the amount of \$282,731.56, consisting of the \$120,000.00 necessary to cure the default, and the arrears through May, 2012 in the amount of \$162,731.56.

The Court finds the requirement of an undertaking appropriate in this matter due to a history of tenant's shortcomings in meeting its financial obligations under the leasehold.

In accordance with the foregoing, it is hereby

ORDERED that the motion for a *Yellowstone* injunction is granted, and the period in which to cure any alleged default under the lease is tolled for sixty days from the date of entry of this order; and it is further

ORDERED that the cross-motion to dismiss is denied; and it is further


ORDERED that the undertaking is fixed in the sum of \$282,731.56, and shall be furnished within ten days of the date of entry of this order; and it is further

ORDERED that defendant, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, for the period specified in this order, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, from terminating plaintiff's lease of the store and basement premises located at 331 Madison Avenue, New York, New York, or commencing an action or proceeding to recover possession based upon the Notice to Cure; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Part 63, Room 311, 71 Thomas Street, New York, NY on July 11, 2012 at 2:00 p.m.

This constitutes the decision and order of the Court.

Dated: 5/9/12

ENTER:  
  
\_\_\_\_\_  
Ellen M. Coin, A.J.S.C.