

**2626 Bway LLC v Broadway Metro Assocs., L.P.**

2012 NY Slip Op 33831(U)

January 30, 2012

Supreme Court, New York County

Docket Number: 105635/10

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART THREE

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2626 BWAY LLC,

Plaintiff,

-against-

Index No. 105635/10  
Motion Date: 7/01/2011  
Motion Seq. No.: 002

BROADWAY METRO ASSOCIATES, L.P.,

Defendant.

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BRANSTEN, J.

Plaintiff 2626 Bway, LLC ("2626") moves to renew its application for a *Yellowstone* injunction.<sup>1</sup> Defendant Broadway Metro Associates, L.P. ("Broadway"), opposes the motion.

**I. Background**

On September 1, 2006, 2626 and Broadway entered into a forty-eight year commercial lease (the "Lease") for the premises located at 2624-2626 Broadway (the "Premises"). John Souto's Affidavit in Support of Motion for a *Yellowstone* Injunction ("Souto *Yellowstone* Aff."), Ex. D. Article 13 of the Lease required that "Tenant, at all times during the Lease Term and at Tenant's expense, shall provide and maintain [a valid insurance policy] in full force and effect with insurers approved by Landlord." John Souto's Affidavit in Support of Motion to Renew ("Souto Aff."), Ex. 3, pp. 17-18.

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<sup>1</sup> See *First Natl. Stores v. Yellowstone Shopping Ctr.*, 21 N.Y.2d 630 (1968).

In September of 2008, 2626 notified Broadway that it intended to purchase a new insurance policy from Lloyd's of London ("Lloyd's") covering the portion of the premises 2626 rented from Broadway. Souto Yellowstone Aff. Ex. K, p. 9. Broadway refused to accept the Lloyd's policy because the draft language of the offered policy stated that Lloyd's was not licensed by the State of New York, that Lloyd's was not subject to the rules and regulations of the New York State Department of Insurance and that Lloyd's did not participate in the New York State Department of Insurance Insolvency Fund. *Id.* On December 10, 2008, Broadway sent 2626 a Notice of Default stating that 2626 had violated Article 13 of the Lease requiring 2626 to maintain insurance approved by Broadway. Souto Aff., Ex. 3, p. 36. The Notice of Default further stated that Broadway would terminate the Lease if 2626 failed to cure the default within 30 days. Souto Aff., Ex. 3, p. 36.

On January 7, 2009, 2626 moved for a *Yellowstone* injunction to temporarily stay termination of the lease. Affidavit in Opposition to Motion for a *Yellowstone* Injunction of M. Teresa Daley ("Daley *Yellowstone* Opp'n"), ¶ 27. This court denied the motion on January 12, 2009, holding that 2626 had "not procured insurance which is satisfactory to the Landlord. While the name 'Lloyd's of London' is venerable, it is not in conformity with the Insurance Laws of the State of New York." Order of January 12, 2009 ("January 12th Order"), p. 1.

Meanwhile, 2626 did not obtain an insurance policy that Broadway found acceptable. Souto Aff., Ex. 3, p. 13. On March 18, 2010, Broadway sent 2626 another Notice of Default. The Notice stated that 2626 had “failed to provide and maintain in full force and effect insurance, as more specifically required by Article 13 of the Lease, with insurers approved by the Landlord.” Souto Aff., Ex. A. Once again, the Notice of Default informed 2626 that Broadway would terminate the Lease if 2626 did not purchase acceptable insurance within 30 days. *Id.* 2626 procured an acceptable insurance policy on April 1, 2010. Souto Aff., Ex. 3, p. 11.

In response to the March 18th Notice of Default, 2626 moved for a *Yellowstone* injunction on April 29, 2010. 2626 asked the court to: (1) enjoin and restrain Broadway from terminating the Lease; (2) enjoin and restrain Broadway from ejecting and/or ousting 2626 from the Premises; and (3) extend the time for 2626 to cure any default under the Lease as alleged in the Notice of Default if the Court determined that 2626 was in default. June 21st Decision, pp.1-2. Broadway cross-moved for an order directing 2626 to pay use and occupancy, to deposit all rent that had accrued to date in an escrow account and to post a bond or an undertaking of at least \$1 million. *Id.* at 2. On June 21, 2010, following four days of hearings, this court denied 2626’s motion and ordered Plaintiff to pay any outstanding rent. *See id.*

On July 1, 2010, 2626 moved to renew its motion for a *Yellowstone* injunction based on new facts.

## II. Standard of Law

A motion for leave to renew shall be based upon new facts not offered on the prior motion. The new facts must be those that would change the prior determination or demonstrate that there has been a change in the law that would change the prior determination. CPLR 2221(e)(2). Movant must provide reasonable justification for the failure to present such facts on the prior motion. CPLR 2221(e)(3). Any alleged new facts must accompany a party's application to renew. *Reyes v. Sequeira*, 64 A.D.3d 500, 512-13 (1st Dep't 2009).

## III. Analysis

Plaintiff fails to present any new facts or changes in the law that would alter the court's prior decision in this case. Plaintiff merely offers further support for arguments that it has already raised in prior motions.

Plaintiff contends that it is entitled to renew its application for a *Yellowstone* injunction because Broadway purchased an insurance policy on behalf of 2626 when 2626's insurance lapsed. *Souto Aff.*, ¶ 6. Consequently, Plaintiff argues, the Premises was never uninsured. Plaintiff's Memorandum of Law ("Plaintiff's Memo"), p. 7. Plaintiff asserts that it therefore did not breach the Lease's § 13 requirement that Plaintiff maintain insurance approved by Broadway. *Id.* Plaintiff claims that it obtained proof of the policy Broadway allegedly purchased as part of discovery in a bankruptcy proceeding

following the disposition of this case, and that this information merits renewal. *Id.* at ¶ 8. However, Plaintiff discussed the existence of the insurance policy Broadway allegedly purchased in 2626's motion papers and in hearings. *See* June 21st Decision.

While 2626 provides further support for allegations that the court has already considered, it does not proffer any previously unknown facts warranting renewal. Furthermore, Broadway's acquisition of an insurance policy on the premises during 2626's lapse in coverage did not excuse 2626 from its obligations under the Lease. Plaintiff breached § 13 of Lease by failing to insure the Premises, and that breach is incurable. *See id.*

Alternatively, 2626 argues that even if it did breach the lease, *Kyung Sik Kim v. Idylwood, N.Y., LLC*, 66 A.D.3d 528 (1st Dep't 2009), upon which this court relied in part in reaching its decision, is inapplicable.<sup>2</sup> Plaintiff's Memo, pp. 7-8. 2626 erroneously contends that the court based its entire decision on one phrase that appears in *Kyung Sik Kim*. That phrase states that when there is a gap in insurance, a prospective insurance policy "does not protect defendant [landlord] against the unknown universe of claims arising during the period of no insurance coverage." *Kyung Sik Kim*, 66 A.D.3d at 529. Plaintiff reasons that if Broadway had insurance on the premises during the gap in 2626's coverage, then there can be no "unknown universe of claims." Plaintiff's Memo, p. 7.

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<sup>2</sup> Plaintiff does not allege that the relevant case law has changed, only that it was misapplied.

Plaintiff's argument is unavailing. 2626 ignores the rest of the quote from *Kyung Sik Kim* that appears in this court's opinion. The remaining portion of the quote states that the tenant in *Kyung Sik Kim* "had not previously and continuously maintained insurance coverage as required by their commercial lease. This violation was a material breach of the lease . . . and, in these circumstances, an incurable violation that is an independent basis for the denial of *Yellowstone* relief." *Kyung Sik Kim*, 66 A.D.3d at 529. None of the evidence 2626 presents on its motion to renew renders this portion of *Kyung Sik Kim* inapplicable. Regardless of any insurance allegedly procured by Broadway, 2626's insurance lapsed from December of 2008 until April 1, 2010.<sup>3</sup> The lapse in insurance was and continues to be a material breach of the lease.

Plaintiff's final argument is that Broadway unreasonably rejected Plaintiff's Lloyd's policy as inadequate under Article 13 of the Lease. Souto Aff., ¶ 5. Plaintiff claims that it recently discovered that for part of 2010, Broadway held an insurance policy from Lloyd's that was similar to Plaintiff's Lloyd's policy. Plaintiff claims that this fact proves that Broadway acted unreasonably in rejecting Plaintiff's Lloyd's Policy, and that the Lease requires Broadway to act reasonably. Plaintiff's Memo, p. 8. 2626 also offers as "new evidence" an affidavit from an insurance professional, Akos Swierkiewicz.

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<sup>3</sup> It is unclear from the parties' moving papers exactly when the policy Plaintiff held prior to the Lloyd's policy expired. 2626 does not dispute that it did not have an insurance policy approved by Broadway following the December 10, 2008 Notice of Default and until April 1, 2010.

Souto Aff. Ex., 3. Mr. Swierkiewicz states that Broadway's rejection of 2626's Lloyd's policy was unreasonable. He avers that Broadway had previously accepted other policies from insurers not licensed by New York State and that Lloyd's offers more security than the New York State Guaranty Fund. *Id.* at p. 13.

This court already held that 2626's Lloyd's of London policy was unacceptable under the laws of New York. *See* January 12th Order. Mr. Swierkiewicz provides no convincing new facts that would cause the Court to alter its prior determination, but, rather, reiterates the arguments made in 2626's prior motion. Plaintiff provides no reason why Mr. Swierkiewicz could not have presented his opinion when this motion was originally litigated. The court thus finds no basis on which to grant 2626's motion to renew pursuant to CPLR 2221, and the motion is denied.

*The court's order follows on the next page.*

**IV. Conclusion**

For the foregoing reasons, it is hereby

ORDERED that Plaintiff's motion to renew is denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
January 30, 2012

ENTER:



Hon. Eileen Bransten, J.S.C.