

Mount Sinai Hosp. v 1998 Alexander Karten Annuity Trust
2013 NY Slip Op 31234(U)
June 10, 2013
Supreme Court, New York County
Docket Number: 652035/11
Judge: Eileen Bransten
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN
Justice

PART 3

Index Number : 652035/2011
MOUNT SINAI HOSPITAL
vs.
1998 ALEXANDER KARTEN
SEQUENCE NUMBER : 002
EXTEND TIME

INDEX NO. 652035/11
MOTION DATE 4/29/12
MOTION SEQ. NO. 002

The following papers, numbered 1 to 3, were read on this motion to/for Yellowstone injunction
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

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

IS DECIDED
IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 6-10-13

Eileen Bransten
HON. EILEEN BRANSTEN

- 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: IAS PART THREE

-----X

THE MOUNT SINAI HOSPITAL,

Plaintiff,

-against-

Index No. 652035/11
Motion Date: 11/29/12
Motion Seq. No.: 002

THE 1998 ALEXANDER KARTEN ANNUITY TRUST,

Defendant.

-----X

BRANSTEN, J.

Plaintiff The Mount Sinai Hospital (“Mount Sinai”) moves for leave to file an amended complaint and to extend the *Yellowstone* injunction previously entered by the Court. Defendant The 1998 Alexander Karten Annuity Trust (the “Trust”) opposes.

I. Background¹

The Trust is the landlord of the building at 309-327 East 94th Street, New York, New York (the “Premises”). Mount Sinai rents a portion of the Premises pursuant to a lease executed on September 15, 1997 (the “Lease”).² The Lease is a commercial lease providing for operation of a dialysis center, medical offices and medical laboratories. Mount Sinai has operated a kidney dialysis center at the Premises since 1997. *Id.* at ¶ 8.

¹ Unless otherwise stated, the facts in this section are taken from this Court’s Decision and Order of January 31, 2012.

² Mount Sinai also rents a portion of the Premises’ ground floor pursuant to a lease executed on August 10, 1993 (the “First Floor Lease”). The First Floor Lease is not at issue in this motion.

Section 49.01(a) of the Lease requires Mount Sinai to pay as additional rent its proportionate share (19.86%) of the annual operating expenses of the Premises incurred by the Trust. Section 49.03 states that the Trust “shall submit to Lessee (as soon as reasonably practicable), a statement setting forth the Operating Expenses” each year. Under § 49.05, Mount Sinai then has 30 days from receipt of the operating expense statement to dispute the amount contained therein.

Despite § 49.03’s requirement that the Trust provide annual statements of operating expenses to Mount Sinai, the Trust did not bill Mount Sinai for the Trust’s operating expenses until March 1, 2011. The Trust then sent Mount Sinai a statement asking for 12 years of operating expenses totaling \$369,793.66 (the “Statement”). Mount Sinai neither paid the operating expense arrears nor disputed the amount within the 30-day window provided in § 49.05 of the Lease.

On June 14, 2011, the Trust sent Mount Sinai a Notice of Default. The Trust therein asserted that Mount Sinai had breached the Lease by failing to: (1) pay the \$369,793.66 of operating expenses, (2) reimburse the Trust for fire alarm testing, (3) abate, after due notice, the noise emanating from a pump on the ground floor of the Premises, (4) cease the driving and parking of ambulettes on the sidewalk in front of the Premises, and (5) cure a fire code violation. The Notice of Default further stated that if Mount Sinai failed to cure the alleged defaults within 30 days, then any title and interest Mount Sinai held under the lease would “wholly cease and expire.”

On July 26, 2011, Mount Sinai moved for a *Yellowstone* injunction and Temporary Restraining Order enjoining the Trust from terminating the lease pending the resolution of the instant dispute. On August 16, 2011, the Trust cross-moved for partial summary judgment pursuant to CPLR 3212 opposing the *Yellowstone* injunction and asking for a declaration that Mount Sinai is liable to the Trust for all outstanding operating expenses, totaling \$369,793.66.

On January 31, 2012, the Court granted Mount Sinai's motion for a *Yellowstone* injunction and held that Mount Sinai was excused from paying its portion of the Trust's operating costs expended prior to March 1, 2009 (the "2012 Order"). (January 31, 2012 Decision and Order, p. 8.) The Court ordered Plaintiff to pay 19.8% of the operating expenses incurred by the Trust between the dates of March 1, 2009 and March 1, 2011. *Id.*

Mount Sinai contends that it never received a proper invoice providing it with the amount of operating costs expended by the Trust from March 1, 2009 until March 1, 2011. (Affidavit of Sharon Gomez in Support of Plaintiff's Motion to Amend and Extend the *Yellowstone* Injunction ("Gomez Aff."), ¶ 2.) For that reason, Mount Sinai has not paid the Trust its share of those operating expenses. Mount Sinai has continued to pay its monthly rent obligations to the Trust as they come due. *Id.*

The Lease Renewal and Extension Agreement, entered into by the parties as of September 1, 2010, extended the Lease until April 30, 2013, and provided Mount Sinai with an option to renew the Lease for one additional year, until April 30, 2014 (the

“Option to Renew”). (Affidavit of Joseph Karten (“Karten Aff.”), Ex. D (“Option to Renew”), §§ 1.B & 2.A.) On March 21, 2012, Mount Sinai sent notice to the Trust that it was exercising its Option to Renew the Lease through April 30, 2014. (Gomez Aff., Ex. 1.) On April 16, 2012, the Trust rejected Mount Sinai’s exercise of its Option to Renew on the ground that Mount Sinai was in default under the Lease for failing to pay the operating expenses ordered pursuant to this Court’s 2012 Order. *Id.* at Ex. 2.

II. Analysis

A. Motion to Amend

Leave to amend a pleading should be freely granted so long as the amendment will not cause surprise or prejudice to the opposing party. *See* CPLR 3025(b); *see also* *Solomon Holding Corp. v. Golia*, 55 A.D.3d 507, 507 (1st Dep’t 2008) (granting motion to amend absent showing of surprise or prejudice).

Mount Sinai seeks leave to amend the complaint to include new allegations, namely the Trust’s improper rejection of Mount Sinai’s exercise of its option to renew the Lease. (Affirmation of David Slarsky in Support of Plaintiffs’s Motion to Amend to Complaint and Extend the *Yellowstone* Injunction (“Slarsky Affirm.”), Ex. 4 (Proposed Amended Complaint).) The Trust does not oppose the amendment.

There is no surprise or prejudice to the Trust in permitting Mount Sinai to amend its complaint. Accordingly, Mount Sinai’s motion to amend the complaint is granted.

B. Yellowstone Injunction

“The purpose of a Yellowstone injunction is to maintain the status quo so that the tenant may challenge the landlord's assessment of its rights without the tenant, during the pendency of the action, forfeiting its valuable property interest in the lease.” *Lexington Ave. & 42nd St. Corp. v. 380 Lexchamp Operating*, 205 A.D.2d 421, 423 (internal citations omitted). “As such, it may be granted on less than the normal showing required for preliminary injunctive relief.” *Id.*

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, notice to cure, or a threat of termination of the lease; (3) it requested the 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. *Id.* A tenant satisfies its burden of establishing that it is able to cure the alleged default by means short of vacating the premises by indicating in its motion papers that it is willing to repair any default found by the court and by providing proof that it has made substantial efforts to cure the default. *TSI W. 14, Inc. v. Samson Assocs., LLC*, 8 A.D.3d 51, 52-3 (1st Dep't 2004).

Mount Sinai contends that it has met the standards to obtain a *Yellowstone* injunction. Mount Sinai argues that the Trust was not entitled to reject its exercise of its Option to Renew because it was not in default under the Lease at the time it elected to

exercise its option. (Memorandum of Law of the Mount Sinai Hospital in Support of its Motion to Amend the Complaint and Extend the Injunctive Relief (“Plaintiff’s Memo”), p. 7.)

The Trust contends that Mount Sinai is not entitled to a *Yellowstone* injunction because the Option to Renew is only valid provided Mount Sinai is not in default under the Lease. (Memorandum of Law of the 1998 Alexander Karten Annuity Trust in Opposition to the Motion of the Mount Sinai Hospital to Amend the Complaint and Extend the Injunctive Relief (“Defendant’s Memo”), p. 4.)

The Court finds, as it found in its 2012 Order, that Mount Sinai has met the standard for a *Yellowstone* injunction. (1) Mount Sinai holds a commercial lease; (2) the Trust’s rejection of Mount Sinai’s Option to Renew constituted a notice of default; (3) Mount Sinai requested to extend the *Yellowstone* injunction prior to the end of the Lease and (4) Mount Sinai has indicated in its motion papers that it is prepared to pay the operating expenses upon receipt of a proper invoice from the Trust or if ordered by this Court in a specific sum. *Lexington Ave.*, 205 A.D.2d at 423.

In opposition to Mount Sinai’s request for injunction, the Trust cites to cases holding that *Yellowstone* does not automatically permit a tenant to exercise an option to renew where that exercise is conditioned on the tenant’s freedom from default, as is the case here. *See Waldbaum, Inc. v. Fifth Ave. of Long Isl. Realty Corp.*, 85 N.Y.2d 600, 606 (1995) (a *Yellowstone* injunction cannot “in and of itself, relieve plaintiff of the necessity of complying with the condition precedent to renewal set forth in the lease, that

plaintiff not be in default); *see also Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 3 A.D.3d 335, 336 (1st Dep't 2004) ("It is settled that the grant of *Yellowstone* relief does not obviate the necessity to satisfy the condition precedent to renewal that a tenant be in full compliance with the terms of its lease at the time the renewal option is exercised."). These cases are inapposite, because Mount Sinai was not in default under the Lease when it validly exercised its Option to Renew on March 21, 2012.

In the 2012 Order, the Court ordered that Mount Sinai "must pay 19.8% of operating expenses [the Trust] incurred between the dates of March 1, 2009 and March 1, 2011." (January 31, 2012 Order, p. 8.)

Mount Sinai has requested several times that the Trust provide it with an appropriate invoice for the operating expenses due under the 2012 Order. (Slarskey Affirm., Exs. 1-3; *see also* Affirmation of David Slarskey in Further Support of Plaintiff's Motion to Amend the Complaint and Extend the *Yellowstone* Injunction, Ex. 1.) To date, however, the Trust has failed to provide such an invoice. The Trust has instead submitted an invoice to Mount Sinai that lays out the building operating expenses per year, without any monthly breakdown. (Karten Aff., Ex. E.) Although, pursuant to the 2012 Order, Mount Sinai must pay 19.8% of the operating expenses for all of 2010, the order required that Mount Sinai pay operating expenses for a portion of 2009, from March through December, and a portion of 2011, from January through March. Accordingly, Mount Sinai cannot pay the operating expenses until the Trust sends it a proper invoice, listing out expenses by month for 2009 and 2011.

Because Mount Sinai, through no fault of its own, is unaware as to what precise amount is owed under this Court's 2012 Order, it is not in default under the Lease, and it validly exercised its option to renew on March 21, 2012. Accordingly, Mount Sinai's motion for a *Yellowstone* injunction is granted.

ORDER

It is hereby

ORDERED that Plaintiff's motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that Defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that Plaintiff's Motion for a *Yellowstone* Injunction is granted; and it is further

ORDERED that Defendant shall provide an invoice to Plaintiff specifying the costs per month of the building operating expenses for the years 2009 and 2011 within 15 days of the service of this order with notice of entry thereof; and it is further

ORDERED that upon Defendant's submission of an invoice to Plaintiff, Plaintiff shall pay such fees, including the annual fees for the year 2010, within 30 days of the

receipt of the invoice, unless Plaintiff contest the costs, in which case Plaintiff is to submit a motion contesting the costs within thirty days of the receipt of the invoice.

Dated: New York, New York

June 10, 2013

ENTER:

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.