SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH J.S.C. Justice PART 54

Burlington Coat Factory

-v-

Majestic Rayon Corp

INDEX NO. 652511/12

MOTION DATE

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 10 — 25

Answering Affidavits — Exhibits ____ No(s). 33 — 63

Replying Affidavits ____ No(s). 64, 65

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

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

Dated: 6/17/13

SHIRLEY WERNER KORNREICH J.S.C.

____, J.S.C.

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: PART 54

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BURLINGTON COAT FACTORY OF NEW YORK, LLC,

Plaintiff,

-against-

Index No. 652511/2012
DECISION & ORDER

MAJESTIC RAYON CORPORATION, and CUDGE REALTY, LLC,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff Burlington Coat Factory of New York, LLC (Burlington or Tenant) moves, by Order to Show Cause, for a *Yellowstone* injunction to stay and toll the expiration of the 30-day cure period set forth in the March 7, 2013 Notice to Cure (Second Notice) served on Burlington by defendants Majestic Rayon Corporation (Majestic) and Cudge Realty, LLC (Cudge) (collectively defendants or Landlord), and to enjoin defendants from taking any action to terminate plaintiff's lease or tenancy. Mot. Seq. No. 001. Burlington's Second Amended Complaint seeks declaratory and injunctive relief. On April 5, 2013, the court granted a temporary restraining order pending resolution of the motion.

I. Background

Burlington is the tenant in a valuable, under-market long-term commercial leasehold located on the ground, second and third floors and in the basement (the Space) of 116 West 23rd Street (the Building). Burlington claims that over the last few years, Landlord has harassed it, blocked entry into the common areas, and raised many issues in order to re-obtain the property. Landlord, here, claims that Burlington's large exterior sign was never approved by the New York Department of Buildings (DOB), is illegal, and raises a safety hazard.

On or about May 6, 1994, Burlington's predecessor Burlington Coat Factory Warehouse

of Chelsea, Inc. (Warehouse), as tenant, entered into a proprietary lease for the Space with joint venturers Majestic and Harry Irwin, Inc, as landlord, who had an office located in the Building.[1] Warehouse planned to operate a retail store in the Space. The lease was for an initial term of five years, with five successive renewal options of five years. At the time, the building was designated as an historic landmark by the New York Landmarks Preservation Commission (LPC).

Paragraph 21(B) of the Lease provides:

> It is mutually agreed that if the Tenant shall be in default in performing any of the terms or provisions of this Lease other than the provision requiring the payment of rent or additional rent, and if the Landlord shall give to the Tenant notice, in writing of such default, and if the Tenant shall fail to cure such default within the thirty (30) days after the date of the giving of such notice, or if the default is of such character as to require more than thirty (30) days, then if tenant shall fail to use reasonable diligence in curing such default during such thirty (30) day period and to diligently pursue such cure to completion, then and in any such events, as one remedy but not to the exclusion of other remedies Landlord may have hereunder or at law or equity, the Landlord may cure such default. . .

Haigney Aff, Exh. B. Pursuant to Paragraph 22, Landlord may cancel the Lease on five days notice if Tenant fails to cure the default after the requisite notice.

Article 8(A) of the Lease provides, in relevant part:

> The Landlord agrees that the Tenant may at its own expense, from time to time during the term hereof, make such alterations, additions and changes in and to the Demised Premises as it finds necessary or convenient for its purposes, providing, however, that it shall not make a structural alteration or repair costing over Twenty-Five Thousand ($25,000) Dollars, [. . .] without first obtaining Landlord's written consent. Landlord hereby consents to Tenant performing all work necessary to convert the Demised Premises to a retail facility [. . .] The Tenant agrees that all alterations, additions and changes made by it will be [. . .]

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[1]The Second Amended Verified Complaint identifies Majestic's principal place of business as located on the fourth floor of the Building. Cudge is identified as having an address for service of process in Great Neck, New York. ¶9

performed in accordance with Exhibit "C" hereto.

Exhibit C to the Lease obligated plaintiff to: provide Landlord with all plans, drawings, layouts and specifications regarding work and alterations; "comply with all applicable laws and the rules, regulations, requirements and orders of any and all governmental agencies, departments or bureaus having jurisdiction (including, without limitation, the Landmark [C]ommission"; obtain all required governmental permits and approvals, and deliver copies thereof to the Landlord.

Article 42 of the Lease provides:

> Tenant may install name identification signs if permitted to do so by the governing municipal agencies (including, without limitation, the Landmark Commission).

Additionally, the Lease contained: an indemnity provision (Article 18) providing that Tenant would indemnify and hold harmless the Landlord "from and against any and all claims and demands"; and a non-waiver provision [Article 24(B)] providing that acceptance of rent by the Landlord with knowledge of the Tenant's default does not constitute a waiver.

The Lease was modified seven times, mostly due to Warehouse's assumption of additional retail space in the Building and the attendant alteration work. The Lease Modifications included or incorporated the following language: "Landlord and Tenant represent and warrant that the Lease is presently in full force and effect and that no event of default remains uncured on the part of Landlord or Tenant." The First Lease Modification was dated July 21, 1994. Beginning with the Sixth Lease Modification dated October 16, 2001, Harry Irwin was replaced by defendant Cudge Realty, LLC. Cudge and Majestic are identified as joint venturers with an office in the Building, and as successors in interest to Majestic and Irwin. On or about April 2, 2006, Warehouse was merged into Burlington.

After execution of the original Lease, Warehouse embarked on renovation work, which it agreed would comply with the Lease and the rules and regulations of the LPC and the DOB. Majestic and Irwin agreed to power wash and paint the Sixth Avenue exterior of the Building. Affidavit of Stacey J. Haigney (Haigney Aff.), Exh. B (Lease, Article 28).[2] Warehouse hired multiple professionals, including Higgins Quasebarth & Partners, LLC (HQP), a consultant specializing in the preservation and rehabilitation of historic properties ion New York City. HQP acted as Warehouse's liaison with the LPC.

On June 30, 1995, the LPC issued a Certificate of Appropriateness (COP) with respect to all of the exterior work to be performed by Warehouse, including the installation and appearance of the subject, projecting vertical "blade" sign with the name "Burlington Coat factory" on it, which extended from the second to the third floors on the exterior of the Building (Blade Sign). The CPC notified Majestic and Harry Irwin of the COP by detailed letter, dated June 30, 1995. Affidavit of David Nicholson (Nicholson Aff), Exh.A.[3] After completing the renovation work, and installation of the Blade Sign, Warehouse opened the store on September 7, 1995.

Some time in March, 2012, seventeen years after the Blade Sign had been installed, the Landlord "learned, through a newly hired consultant it had commissioned to provide a more complete picture of Burlington's compliance issues (including numerous violations, unpaid fines and open applications dating to the 1990s), that the Blade Sign was never approved by the DOB." Second Notice. The Landlord also learned that Burlington (then Warehouse) had filed an

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[2]Haigney is the Vice President and Assistant General Counsel for Burlington.

[3]Nicholson is a principal of SBLM, an architectural design and consulting company that Burlington retained in 2010 to assist in obtaining DOB sign offs with respect to interior and exterior rehabilitation work.

application that the DOB rejected in August 1995. Affidavit of Daniel S. Aibel (Abel Aff.), ¶7.[4] Plaintiff claims that, "During the time period from the installation of the Blade Sign until notification from the landlord that the DOB had not signed off on its installation, Burlington was under the impression that the Blade Sign was in full compliance with all applicable rules and regulations, including those of the DOB." Haigney Aff, ¶17. After March 2012, a series of meetings, e-mails and correspondence between the parties and counsel ensued, culminating in the first 30-Day Notice to Cure dated June 29, 2012, requiring Burlington to:

> (I) obtain from the LPC a re-issued original (or newly issued) certificate of appropriateness, containing a current date and (ii) submit to the DOB an application for approval of the Blade Sign, both by the Cure Date [August 3, 2012], or, in the alternative to (I) and (ii), cause by the Cure Date, the Blade Sign to be removed by a DOB-licensed sign installer.

Failure to do (I) and (ii) or to remove the sign by August 3, 2012, would result in the Landlord terminating the Lease. Aibel Aff., Exh.G. There is no indication whether this First Notice was sent by registered or certified mail, as required by the Lease, Article 25.

Defendants assert that Burlington failed to act diligently to effect a cure. Burlington contends that it had to reconstruct plans and paperwork, which caused a delay. It filed its original Complaint on July 19, 2012, seeking a Yellowstone Injunction, a Preliminary Injunction to prevent the Landlord from inhibiting Burlington's use of the common areas of the Building, Declaratory Relief and damages for Breach of Contract and the Covenant of Good Faith and Fair Dealing. By Stipulation dated July 20th, the parties extended the Cure Date to August 17th. Burlington obtained the requisite letter from the LPC and, on August 14, 2012, submitted an

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[4]Aibel is the Vice President of both Majestic and Cudge. He does not disclose when he became associated with Majestic or how he learned of the facts stated in his Affidavit.

application in proper form to the DOB. The Landlord then withdrew the First Notice without prejudice.

The DOB rejected Burlington's Application on August 22, 2012. Defendants claim that Burlington failed to inform them of the rejection and learned of it on visiting the DOB website. Burlington does not deny this, however, there is no allegation that Burlington hid or withheld this information. After Burlington met with the DOB on September 21, 2012, the DOB issued eleven objections to the Blade Sign. By March 6, 2013, Burlington, with the help of attorneys and other professionals, had cured nine of the objections. The two objections which remain concern zoning violations. The DOB cannot approve the Application because the Blade Sign violates zoning regulations pertaining to its height above street level and its projecting distance from the facade. The sign is forty-nine feet above street level, exceeding the maximum height by nine feet, and it projects from the building significantly beyond the maximum eighteen inches.

The Landlord has taken the position that the only cure possible is removal of the sign. In a letter dated December 17, 2012, Burlington took the position that the LPC would not have approved the sign in 1995 "if it did not meet the zoning requirements." In that same letter, Burlington declined to remove the sign until exhausting "all measures concerning such approval." Thereafter, counsel for the LPC clarified that Burlington's position was incorrect. Defendants served a second 30-Day Notice to Cure dated March 7, 2013 (Second Notice). The Second Notice states that, "in violation of Articles 8(A) and 42 and Exhibit C of the Lease, Tenant erected [the Blade Sign] without obtaining the requisite approval from the [DOB], rendering the Blade Sign illegal." The cure demanded by the Landlord is removal of the Blade Sign from the Building.

On April 9, 2013, Howard Zipser (Zipser), Burlington's zoning counsel and Burlington's architect Nicholson met with the DOB Manhattan Borough Commissioner Martin Rebholz (Rebholz) to request a waiver. According to Zipser, Rebholz said that he could not grant the waiver, but that he would have one of DOB's technical personnel review the Application and get back to them, which had not occurred as of the May 7th hearing date for the motion. Zipser Aff., ¶¶3-4. They also discussed Burlington's intention to seek a waiver under Zoning Regulation (ZR) 74-711. Zipser had scheduled a meeting to discuss Burlington's application for a ZR 74-711 waiver for May 8th, to include himself, NYC Counsel's office, a representative of the City Planning office, and Burlington's Executive Vice President and Chief Marketing Officer Bart Sichel. *Id.*, ¶6. The court has not been apprised of the result of that meeting.

Burlington commissioned an engineer to inspect the store and the exterior. In a report dated June 22, 2012, James Emery of O2 Facilities states,

> The large blade sign on the corner of 22nd and 6th Ave. appears to be fixed to the building with high-strength steel angles and fasteners. In addition, with a relatively small vertical wind profile, lightweight nature of sign construction, and the fact that the sign doesn't appear to have moved or have any missing parts over a seventeen-year period, there did not appear to be any threat to health and safety.

Exh.E, Aibel Aff. In an earlier letter, the sign manufacturer stated that in its opinion, the sign was properly installed and did not pose a safety threat. Exh.F, Aibel Aff. In January 2013, Burlington had the Blade Sign re-inspected by a sign hanger at the DOB's request, which inspection included opening up the walls of the leased premises to review the methods used to secure the sign and to review its present condition. "Following such inspection, a hanger certification form was prepared by the sign hanger and such form was submitted to and accepted by the DOB." Amended Verified Complaint, ¶26. To date, neither the Zoning Board nor the

DOB has issued any order declaring the Blade Sign illegal, and the DOB has not issued an order requiring its removal.

II. *Motion Papers*

Burlington claims that it has met the requirements for a *Yellowstone* Injunction because it holds a commercial lease, it has received a notice to cure, the Landlord has threatened to terminate the Lease, and Burlington has the ability to cure the default. Burlington claims it has the ability to cure because it intends to pursue a modification of the zoning requirements from the City Planning Commission under ZR 74-711. Howard Zipser, Burlington's counsel who is experienced in seeking such modifications, has averred that he believes the application will be successful, although time consuming and expensive.

Defendants, on the other hand, claim that Burlington does not have the ability to cure because its request for a zoning waiver is speculative and requires defendants' consent, which they intend to "reasonably" withhold. In support of this claim, defendants have submitted an affidavit from Majestic's land use counsel explaining the process for seeking zoning modification and disputing the assertion of Howard Zipser that seeking the modification represents a reasonable option. Hockens Aff. Defendants further claim that Burlington is not entitled to the injunction because it has admitted the default.

III. *Discussion*

Plaintiff's motion for a *Yellowstone* injunction is granted. The purpose of a *Yellowstone* injunction is to stop the running of the cure period and to maintain the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold while the merits of the underlying dispute is being litigated

(*Graubard Mollen Horowitz Pomeranz & Shapiro*, 93 NY2d at 514). Our courts have held that a *Yellowstone* injunction is appropriate in circumstances where there is not a sufficient basis to evaluate whether a tenant actually has violated its lease and, thus, in default (*see Boi To Go, Inc. v Second 800 No. 2 LLC*, 58 AD3d 482 [1st Dept 2009]; *E.C. Elecs., Inc. v. Amblunthorp Holding, Inc.*, 38 AD3d 401 [1st Dept 2007]). Moreover, because 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, the tenant "need not, as a prerequisite to the granting of a Yellowstone injunction, demonstrate a likelihood of success on the merits" or prove its ability to cure a default"*(Herzfeld & Stern v Ironwood Realty Corp.*, 102 AD2d 737, 738 [1st Dept 1984]). Rather, "[t]he proper inquiry is whether a basis exists for believing that the tenant desires to cure and has the ability to do so through any means short of vacating the premises" (*id.*; *see also WPA/Partners LLC v Port Imperial Ferry Corp.*, 307 AD2d 234, 237 [1st Dept 2003]; *Jemaltown of 125th St., Inc. v Leon Betesh/Park Seen Realty Assoc.*, 115 AD2d 381, 382 [1st Dept 1985]).

Here, neither party has established what the New York City Planning Commission will do in response to Burlington's request for a waiver or modification of the zoning regulations. It appears to the court that there is a fair amount of discretion in the process. Defendants assert that: application for the waiver must include a report from the LPC that will not be issued without defendants, as fee owners, executing and recording a restrictive declaration providing for the restoration of the Building to sound, first class condition and committing to a continuing maintenance program; and all other parties-in-interest would be required to sign the Declaration, which would have to be recorded, thereby binding future mortgagees or parties-in-interest.

Burlington asserts that: based on conversations between Zipser and LPC counsel John Weiss and Zipser's experience, it would be possible to negotiate with the LPC to limit the restrictive covenant to the period of Burlington's tenancy. Then too, Landlord cannot withhold its cooperation with the zoning process merely to frustrate Tenant's rights.

The court need not determine the outcome of the zoning process at this point. Although defendants argue the *Yellowstone* injunction should be denied in the absence of proof that plaintiff actually has the ability to cure, our courts have held that where, as here, plaintiff has professed a willingness to do whatever is necessary to cure a lease default, it is sufficient that there exists a potential means to cure the alleged default *(see Marathon Outdoor, LLC. v Patent Constr. Sys. Div. of Harsco*, 306 AD2d 254, 255 [2nd Dept 2003]; *Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225, 229 [1st Dept 1997]). Nevertheless, Burlington has stated that in the event it fails to obtain a waiver of the zoning regulations, it will take down the sign as a last resort. After seventeen years, Burlington is entitled to explore every possible option that would allow it to retain a sign it contends is essential to its business.

In granting *Yellowstone* relief, a court may require the posting of an undertaking by the party seeking relief in an amount rationally related to the quantum of damages which the nonmoving party would sustain, in the event the moving party is later determined not to have been entitled to such relief (*see 61 W. 62nd Owners Corp. v Harkness Apt. Owners Corp.*, 173 AD2d 372, 373 [1st Dept], *lv dismissed* 78 NY2d 1123 [1991]). As there is no mention or discussion in the parties' submissions with respect to the actual amount of any damages that defendant might sustain, because the Lease includes an indemnification clause, in the event that this court determines that plaintiff is not entitled to this injunctive relief and since plaintiff is

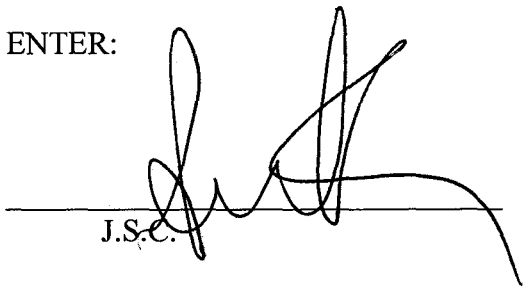
paying use and occupancy in the full amount of rents and charges required under the lease, plaintiff is directed to file an undertaking in the amount of $10,000. Accordingly, it is

ORDERED that plaintiff's motion seeking a *Yellowstone* injunction is granted; and it is further

ORDERED that plaintiff's undertaking is fixed in the sum of $10,000, upon condition that plaintiff, if it is finally determined that it is not entitled to a *Yellowstone* injunction, will pay to defendants all damages and costs which may be sustained by reason of this injunction.

ENTER:

Dated: June 17, 2013



J.S.C.