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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS PART 58

Justice

CHAMPION 221 LLC,

Plaintiff,

-v-

MADAVE PROPERTIES SPE, LLC,

Defendant.

INDEX NO. 103558/12

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1-3
Answering Affidavits– Exhibits	4-8
Replying Affidavits	9,10

CROSS-MOTION: ✓ YES _____ NO

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

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 7/9/13

DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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CHAMPION 221 LLC,

Plaintiff,

-against-

MADAVE PROPERTIES SPE, LLC,

Defendant.

Index №.: 103558/12
Motion Seq. Nos. 001 and 002

Decision and Order

Donna Mills, J.:

In an action involving the prospective termination of a commercial lease, plaintiff Champion 221 LLC (Champion) moves, under CPLR article 63, for a *Yellowstone* injunction enjoining defendant Madave Properties SPE, LLC (Madave) from terminating the lease between the parties, and tolling Champion's time to cure the two alleged breaches that form the basis of Madave's efforts to terminate and evict (motion seq. Nos. 001 and 002). Madave cross-moves, under CPLR 3211, to dismiss Champion's first, third, fifth, and tenth causes of action.

BACKGROUND

This case is rife with the palace intrigue that attends high-end real estate development in Manhattan. Champion, which is a parking garage business, is the last remaining tenant on a property located at 220 Central Park South. Not only has Madave cleared out the other leaseholders on the property, but it has also demolished the existing building except for Champion's parking garage. The commercial lease between Champion and Madave (the lease) runs until 2018. Madave, which is owned by Vornado Realty Trust (Vornado), alleges that Champion is controlled by Gary Barnett (Barnett), and that this action is a proxy battle between Vornado and Barnett's Extell Development Company, which has property interests in the

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surrounding area.

Madave served a notice of default on Champion on July 30, 2012. The notice alleged that Champion had breached the lease by failing to limit parking to "accessory parking" primarily for the tenants who no longer live at 220 Central Park South. Madave referred to a violation that the Department of Buildings (DOB) issued to Madave on June 25, 2012 for "occupancy contrary to that allowed by certificate of occupancy." The DOB noted on the violation that the legal use of the parking garage is "[a]ccessory parking primarily for residents of building," whereas the current use involved "commercial parking . . . for public and by the hour while all residential use of the building has been discontinued."

The history of this DOB violation is curious in that its recipient, Madave, asked for it, through a letter sent to the DOB, on August 31, 2011, advising of the alleged violation and asking if any violations would be issued. When the DOB neglected to issue a violation for over nine months, Madave, on May 11, 2012, sent a follow-up email to inquire into the whereabouts of its own punishment.

In its July 30, 2012 notice of default, Madave argues that Champion's use of the garage violated various provisions of the lease, beginning with article 15, which precludes Champion from violating the building's certificate of occupancy. Additionally, Madave cites article 53 of the lease, which provides that Champion is to comply with "applicable laws, resolutions, codes, rules and regulations of any department bureau, agency or any governmental authority having jurisdiction over the operation, occupancy, maintenance and use of the Premises." Madave also cites article 6, which similarly provides that Champion will comply with all laws and regulations governing the building.

On September 10, 2012, Madave issued a second notice of default. The September 2012 notice involved the sale, on August 4, 2005, by Champion's owners, Kenneth and Gary Rosenblatt, of a 49% interest in Champion to CPS/221 Investor LLC (CPS). Madave alleged that this sale violated article 11 of the lease, which prohibits Champion from assigning the lease without prior written consent of the landlord, as well as various subsections of article 51. Article 51 (a) provides that Champion "shall not assign, or mortgage or otherwise encumber, all or any part of its interest" in the lease without prior written consent. Article 51 (b) provides the manner in which Champion is to provide prior written notice, while Article 51 (g) provides:

> "Tenant represents that its sole Members are Kenneth Rosenblatt and Gary Rosenblatt ("Original Owners"). Any transfer, by operation of law or otherwise, of the interest of Tenant in this Lease (in whole or in part) or of an interest in Tenant (whether stock, partnership interest, limited liability company interest or otherwise) so that the Original Owners or member of their immediate family or trusts for the benefit of the immediate family are no longer holders of a 50% interest in Tenant, shall be deemed an assignment of this Lease within the meaning of this Article. (The issuance of membership interests, stock or otherwise to other than the Original Owners shall be deemed a transfer of such interest for the purposes of this Article)"

Champion initiated this case by filing its summons and complaint on August 16, 2012. On October 15, 2012, it filed an amended complaint. In its first and tenth causes of action, Champion seeks injunctive relief preventing Madave from terminating the lease, and tolling its time to cure both of its alleged defaults under the lease. In its second and eleventh causes of action, Champion seeks a declaration that Madave is estopped from alleging that Champion breached the lease, through, respectively, its use of the garage and the Rosenblatts' sale of 49% of their interest in Champion. The third cause of action seeks an injunction forcing Madave to once again "re-occupy the Building with tenants." The fourth cause of action alleges that

Madave failed to provide notice of the default to Champion's lawyer, as required by the lease, and that, as a result, judgment should be granted to Champion. The fifth cause of action seeks to enjoin Madave from breaching the lease. The sixth cause of action claims that Madave violated the lease's implied covenant of good faith by emptying the building of residents, while the seventh cause of action claims that Madave violated the same implied covenant by "orchestrating" its alleged default involving the parking lot's usage. Similarly, the eighth cause of action alleges that Madave breached its implied duty to use its best efforts to perform under the lease. The ninth cause of action seeks specific performance of the lease, including filling the building once again with residents. Finally, the twelfth cause of action alleges that Madave breached the implied covenant of good faith and fair dealing merely by alleging that Champion defaulted through the Roseblatt/CPS transaction, while the thirteenth alleges that both notices of default are defective because they fail to state specifically what action Champion was to take in order to cure.

DISCUSSION

I. Champion's Application for a *Yellowstone* Injunction

"The purpose of a *Yellowstone* injunction is to allow a tenant confronted by a threat of termination of the lease to obtain a stay tolling the running of the cure period so that, after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold" (*Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225, 227 [1st Dept 1997]). A party seeking a *Yellowstone* injunction must show that: 1) it holds a commercial lease; 2) it received a notice of default, a notice to cure, or a threat of termination from the landlord; 3) it requested the injunction prior to termination of the lease; and 4) it is willing and

able, in the event that it is found to be in breach of the lease, to cure the alleged default "by any means short of vacating the premises" (*CC Vending, Inc. v Berkeley Educ. Servs. of N.Y., Inc.*, 74 AD3d 559, 559 [1st Dept 2010]; *see also Empire State Bldg. Assoc.*, 245 AD2d at 227-228).

Here, the record makes clear that Champion meets the first three requirements. Thus, the applicability of a Yellowstone injunction depends on whether Champion is willing and able to cure the alleged breaches of the lease.

A. Garage Use

Champion argues that the DOB's violation mistakenly states that the parking garage was in violation of the certificate of occupancy. Champion suggests that this error arose through Madave's successful attempts to influence the DOB, and that it went uncorrected because Madave failed to notify Champion of the violation, or allow it to contest the violation. Champion submits, among other things, an affidavit from Caroline Harris (Harris), a land use attorney with expertise in the New York City Department of City Planning's Zoning Resolution. Harris argues that use of the garage by non-residents is explicitly permitted by the certificate of occupancy:

> "The Certificate of Occupancy for the Building authorizes 44 parking spaces for non-residents and residents. It provides that 10 of the parking spaces are to be used as 'permitted off-street accessory parking spaces for owners, occupants, employees, visitors of the building, and patients of the ground floor medical offices' . . . . The Certificate of Occupancy also provides that 'parking is permitted primarily for residents and may include parking for non-residents. Non-resident parking is limited to periods of not less that one week and not more than one month, subject to a right of recapture by residents. Clearly the [DOB notice of violation] mischaracterized the Certificate of Occupancy in three critical respects. It charges that the Garage's use commercially for hourly parking was contrary to the Certificate of Occupancy when the Certificate of Occupancy expressly allows hourly parking. The [notice of violation] limited its description of the legal use to 'Accessory parking primarily for residents of the building.' But

> [] the [notice of violation] misconstrued 'primarily' to mean 'exclusively' and the legal use listed on the Certificate of Occupancy expressly allows non-residents to park in the Garage. Finally, the [notice of violation] implies that the Garage's use depends upon 'continued use of residential units in the building' even though use of the residential units in the Building is not a requirement of the Certificate of Occupancy"

(Harris aff, ¶¶ 28, 30-31).

Champion argues that even if the legal use of the garage is contingent on its providing parking accessory to an inhabited residential building, then it can cure by providing parking for other residential buildings within a 1,000 foot radius. Harris states: "the Garage, a portion of which is located in a commercial zoning district, may provide accessory permitted parking spaces for other residential buildings located within a 1,000 foot radius in accordance with the Zoning Resolution, without modifying the Certificate of Occupancy or obtaining the Landlord's consent" (*id.*, ¶ 53). Champion further contends that the Zoning Resolution is expected to be amended in June 2013 to allow for public parking in the garage. Harris notes that, in the section of Manhattan where the garage is located, "[t]he amendment would allow all new parking facilities, and existing garages licensed by the New York City Department of Consumer Affairs, to operate as public parking facilities.

The court takes judicial notice that, subsequent to the filing of this motion, the amendment Champion refers to did pass.[1] Champion also argues that, in the event that it were somehow in violation, it could apply for a discretionary variance. Moreover, Champion expresses a willingness to cure any default by limiting use of the garage as the court sees fit.

Madave argues that Champion cannot legalize its use of the garage. First, it argues that

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[1] http://www.nyc.gov/html/dcp/html/mn_core/index.shtml

Champion cannot obtain a variance, as only owners are allowed to apply to the New York City Board of Standards and Appeals (BSA) for variances. Madave cites to the BSA's Rules of Practice and Procedure, section 1-09.4, which provides, in relevant part,

> "Every owner of record on a zoning lot which is the subject to an application must execute and submit the Board's Affidavit of Ownership and Authorization form. The form may be completed by the owner or any other entity or person legally authorized to act for such owner. If the applicant is not the owner, the applicant must submit the Affidavit of Ownership and Authorization form signed by the owner(s) of record authorizing the applicant to file the application."

Madave is unwilling to authorize Champion to file such an application. Similarly, Madave intends to block any effort Champion makes to obtain a special permit from the New York City Planning Commission (CPC) to allow public parking at the garage (*see* Philip Habib aff, ¶¶ 14-37). Moreover, Madave contends that in order to receive a permit to allow for public parking, Champion would have to bring the garage up to code, which Madave will not allow it to do. Philip Habib (Habib), an engineering consultant for Madave, stated:

> "The Construction Codes require, without limitation, that a below-ground public parking garage like that maintained by the Garage Tenant must provide access for disabled persons by either (a) providing elevator access from the below-grade garage space to the street level or; (b) moving the required reservoir spaces and parking attendant office to street level so that disabled persons can leave their vehicles with parking attendants without blocking street traffic and without descending to the below-grade garage area . . . the Garage Tenant make the structural and non-structural alterations required to bring the Garage Premises into compliance, because Landlord, which is not required to consent to such alterations, will not consent to such alterations, nor will Landlord re-write the Lease to expand the Garage Tenant's demise"

(Habib affidavit, ¶¶ 39, 41).

Madave also argues that Champion cannot cure by ceasing operation of the parking garage because that would defeat the purpose of the *Yellowstone* injunction. Finally, Madave

argues that, in order to be granted such relief, Champion must demonstrate that it has taken concrete steps to cure. In support, Madave cites a case from this court, *Baruch, LLC v 587 Fifth Ave., LLC*, 2012 WL 171025, 2012 NY Misc LEXIS 127, 2012 NY Slip Op 30067(U), *4 [Sup Ct, NY County 2012] [finding that the fourth requirement for a Yellowstone injunction was met where "plaintiff immediately took substantial steps to cure the violation and is actively working toward that end"]).

Typically, a party to a contract prefers that the other side carries out its obligations under the agreement. Here, Madave fervently wants Champion to breach the lease. Such a position is understandable, as a termination of its lease with Champion would expedite work on the luxury building Madave hopes to build on the property. However, Madave's efforts to force Champion into an irrevocable position of breach has not rendered Champion unwilling or unable to cure the alleged default. Instead, if the amendment to the zoning resolution has not resolved any remaining compliance issues, Champion stands willing to restrict their non-rental car spaces to residents within 1,000 feet of the building. Thus, as it is willing and able to cure if it is found in default, Champion satisfies the fourth requirement and is entitled to *Yellowstone* injunction preventing Madave from terminating the lease for the alleged breach described in the July 30, 2012 notice of default.

Madave tries to insert a new element into the required showing for a *Yellowstone* injunction by misreading *Baruch*. Specifically, Madave suggests that a party must take affirmative steps toward curing an alleged default before applying for a *Yellowstone* injunction. However, while the steps toward curing in *Baruch* were sufficient to show a willingness and ability to cure, this court never suggested that such steps were necessary in order satisfy the

requirements and obtain a *Yellowstone* injunction.

B. Rosenblatt-CPS Transaction

CPS is controlled by Barnett. Madave alleges, based on newspapers articles, that the Rosenblatt/CPS transaction granted Barnett control over any negotiations between Champion and Madave regarding a buyout of Champion's lease, similar to the deals made between Madave/Vornado and the property's former residential lessees.

Again, Champion demonstrates a willingness and ability to cure. Champion submits an affidavit from Barnett, who describes the circumstances in which he purchased, through CPS, 49% of Champion prior to Madave's purchase of the property: "Among the reasons that I acquired 49% interest in the Tenant LLC was that I wanted to have parking available for my nearby projects" (Barnett aff, ¶ 4). More importantly, Barnett stated that he is willing to reverse the transaction if it is found to trigger a breach by Champion: "although we believe there are no conceivable so-called Assignment Defaults, if the Court should deem some 'cure' to be necessary, I stand committed, with the Rosenblatts, to do whatever is required regarding our internal LLC relationship in order to satisfy the Court" (Barnett aff, ¶ 12). In a separate affidavit, Kenneth Roseblatt expresses the same willingness on behalf of himself and his brother (Rosenblatt aff, ¶ 25).

This is a clear showing of a willingness and ability to cure, should the court find that the Rosenblatt-CPS transaction breached the lease. Thus, Champion is entitled to a *Yellowstone* injunction preventing Madave from terminating the lease for the alleged breach described in the September 10, 2012 notice of default.

C. Undertaking

Madave requests that if the court grants the *Yellowstone* applications, as it has, that Champion be required to post an undertaking pursuant to CPLR 6312 (b). Without substantiating the figures, Madave contends that the court must take into account the amount invested into the property ($350,000,000), and the yearly operating costs ($25,000,000). However, Madave fails to show that the operating costs are related to Champion's tenancy or that the continuation of the tenancy endangers Madave's investment. Thus, an undertaking in the amount of one month's rent is appropriate (*see Medical Bldgs. Assoc., Inc. v Abner Props. Co.*, 103 AD3d 488, 488 [1st Dept 2013] ["(t)he undertaking in the amount of three months rent was 'excessive' given the inadequate proof and otherwise speculative arguments offered by the landlord as to potential damages"]).

II. Madave's Motion to Dismiss

"When determining a motion to dismiss, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotations and citations omitted]). "Dismissal under CPLR 3211 (a) (1) is warranted 'only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Madave submits the lease in support of its application for dismissal of the first and tenth causes of action, which seek *Yellowstone* injunctions with regard to each of the alleged breaches.

Madave argues that, as Champion cannot cure either alleged breach, both the first and the tenth cause of action must be dismissed. For the reasons discussed above in analyzing the *Yellowstone* applications, the branch of Madave's cross motion seeking dismissal of Champion's first and tenth causes of action is denied.

Champion's third cause of action seeks an affirmative injunction forcing Madave "to re-occupy the building with residents." Madave notes, as both parties acknowledge, that the building has, except for the parking garage, been demolished. Champion argues that its third cause of action is somehow destined for success based on the doctrine of judicial estoppel because Madave stated, in applying for permission to demolish the building, that it was going to construct a new building over the parking garage.

Madave is entitled to dismissal of Champion's third cause of action because Champion makes no allegations that, if true, would entitle it to force Madave to "re-occupy" a building that has been demolished.

Champion's fifth cause of action alleges that:

> "As a result of defendant's conduct with respect to the Notice of Default as aforesaid, it has engaged in material and unjustifiable breaches of the Lease. Because its remedies in law are inadequate, as aforesaid, plaintiff is entitled to injunctive relief, enjoining and restraining defendant from acting in breach of the Lease as aforesaid"

(amended complaint, ¶¶ 41-42).

Madave cites to *Gordon v Curtis* (68 AD3d 549, 550 [1st Dept 2009]) for the proposition that, in order to properly plead breach of contract, a plaintiff must "identify the express provision that defendants allegedly breached," and argues that Champion's fifth cause of action should be dismissed because it fails to state the express provisions that it allegedly breached. While

Champion refers to express provisions in its papers, it failed to do so in the amended complaint. Thus, it failed to properly plead the fifth cause of action and it must be dismissed without prejudice.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff Champion 221 LLC motion for a *Yellowstone* injunction is granted and it is

ORDERED that defendant Madave Properties SPE, LLC, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, 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, any of the following acts:

> Terminating the Lease with Plaintiff and/or otherwise commencing eviction proceedings pending the determination of the within action and Plaintiff's right to the use and quiet enjoyment of the premises;

and it is further

ORDERED that plaintiff Champion 221 LLC is to file with the County Clerk (Room 141 B) an undertaking in the amount of one months rent; and it is further

ORDERED that defendant Madave Properties SPE, LLC's motion to dismiss is granted only to the extent that plaintiff's third and fifth causes of action are dismissed, the latter without prejudice.

Dated: 7/9/13

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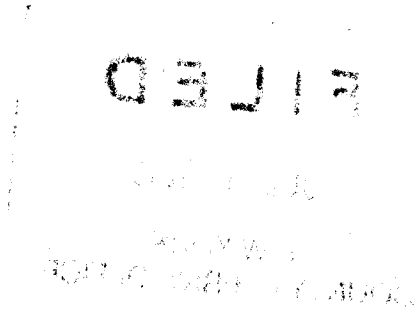
Hon. DONNA MILLS, J.S.C.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