

Zmoore, Ltd. v Kingman Mgt. LLC
2013 NY Slip Op 33073(U)
December 6, 2013
Sup Ct, New York County
Docket Number: 153282/13
Judge: Paul Wooten
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ZMOORE, LTD. d/b/a COMMERCE RESTAURANT,

Plaintiff

INDEX NO. 153282/13

-against-

MOTION SEQ. NO. 001

**KINGMAN MANAGEMENT LLC, PRIDE ROCK, LLC,
RICHARD KINGMAN, JUDITH KINGMAN,
ALEXANDER KINGMAN, and JUDITH KINGMAN
as custodian for Garrett Kingman Under the New York Uniform
Transfers to Minors Act,**

Defendants.

The following papers, numbered 1 to 4 , were read on this motion for a Yellowstone Injunction.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1, 2

Answering Affidavits— Exhibits No(s). 3

Replying Affidavits — Exhibits No(s). 4

Before the Court is an Order to Show Cause (OSC) brought by Zmoore, LTD d/b/a Commerce Restaurant (plaintiff), a commercial tenant, for a *Yellowstone* Injunction seeking to enjoin and restrain Judith Kingman, Alexander Kingman and Judith Kingman, as Custodian for Garrett Kingman under the New York Uniform Transfers to Minors Act (collectively, defendants) from taking any action to terminate plaintiff's leasehold or tenancy, from commencing any action to declare plaintiff's leasehold interests in the commercial space cancelled or terminated, and from commencing summary eviction proceedings, of the commercial space (leased premises) in a building located at 50 Commerce Street, New York, NY (the building). Plaintiff also seeks a declaratory judgment, pursuant to CPLR 3001, determining its rights under the lease. Plaintiff and

Pride Rock LLC, defendants' predecessor in interest, entered into a written lease agreement dated February 8, 2007 for the leased premises, which includes the ground floor of the building and a portion of the basement. Defendants are the owners of the building and are in opposition to plaintiff's motion on the basis that the application for a Yellowstone Injunction is untimely.

BACKGROUND

Plaintiff is a commercial tenant who operates Commerce Restaurant at the premises which is located in the West Village of Manhattan. Defendants own and manage the premises. Pursuant to a Decision and Order of this Court dated March 13, 2013, in the related action between the same parties, currently pending under Index No. 113772/11, this Court permitted defendants to continue its elevator modernization project at the building subject to certain specific conditions including, among other things, the construction and maintenance of containment barriers or walls erected in the basement where the plaintiff Commerce Restaurant prepares its food.

This action arises out of a notice to cure, dated March 8, 2013, which defendant served upon plaintiff that stated plaintiff had breached provisions in the lease agreement by: (1) interfering with the defendants' effort to remove a containment barrier that it installed and attached in front of the elevator doorway and shaft area in the common area of the basement; (2) obstructing ingress and egress from the elevator doorway and/or shaft in the basement of the building by placing a containment barrier and other materials without the defendants' consent; (3) obstructing defendants' access to the defendant areas in the basement, including the boiler room and other spaces designated for the exclusive use of the defendant; and (4) storing personal property in the common area of the basement without the defendants' consent and in defiance of defendants' demands that plaintiff remove such personal property. The notice to cure informed plaintiff that if it failed to cure the aforementioned violations of the lease within 15 days, by March 29, 2013, the defendant would terminate the lease. Subsequently, defendant served a notice of termination upon plaintiff on April 3, 2013, which was given pursuant to the conditional limitation set forth in Article 17 of the lease.

On April 10, 2013 plaintiff filed the herein OSC and on April 15, 2013 this Court denied the portion of plaintiff's OSC which sought a Temporary Restraining Order (TRO) enjoining and restraining defendants from terminating plaintiff's leasehold interests and from commencing any summary proceeding to terminate or cancel the lease. Plaintiff sought an appeal of this decision on April 15, 2013 and same was denied by the Appellate Division, First Department on May 14, 2013 (see Affirmation of Wayne R. Smith in Opposition, exhibit C).

DISCUSSION

"A *Yellowstone* injunction is a provisional remedy, and the purpose of the interlocutory relief is not to determine the ultimate rights of the parties but to maintain the status quo until a full hearing on the merits can be held" (*2914 Third Sportswear Realty Corp. v Acadia 2914 Third Ave., LLC*, 93 AD3d 573, 573 [1st Dept 2012], citing *Gambar Enters. v Kelly Servs.*, 69 AD2d 297, 306 [1979]). In order to obtain a *Yellowstone* Injunction, the moving party must demonstrate that "(1) it holds a commercial lease; (2) it received from the landlord 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 NY2d 508, 514 [1999]; see *Aegis Holding Lipstick LLC v Metropolitan 885 Third Ave. Leasehold LLC*, 95 AD3d 708, 708 [1st Dept 2012]). The limited purpose of a *Yellowstone* injunction is to stay the landlord's termination of the lease while the underlying default is litigated (*id.*).

In this case plaintiff has not demonstrated its right to *Yellowstone* relief, as plaintiff failed to bring this proceeding before the expiration of the cure period, and the notice of termination has already been served (see *First Nat. Stores, Inc. v Yellowstone Shopping Ctr., Inc.*, 21 NY2d 630 [1968]; *KB Gallery, LLC v 875 W. 181 Owners Corp.*, 76 AD3d 909 [1st Dept 2010] [*Yellowstone* relief denied as untimely where the proceeding was brought after the applicable cure period had

expired and the notice of termination had been served)). Any argument by the plaintiff that the notice to cure lacks specificity with alleged defaults and fails to provide tenant notice of how to cure the lease violations is without merit as the notice to cure lays out the specific lease violations by paragraph number and it describes the specific conduct and condition which is the basis for the claimed violations (see Affirmation of D.B. David Shin, Esq., exhibit B).

In view of the fact that this Court is unable to grant *Yellowstone* relief, the complaint must be dismissed (see *Gold-Land, Inc. v Haskell*, 248 AD2d 132 [1st Dept 1998]).

CONCLUSION

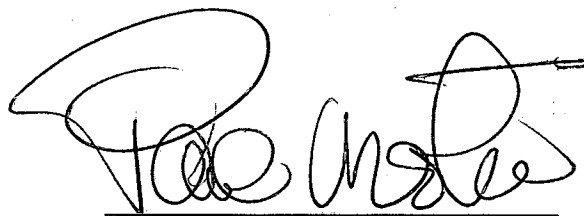
Upon the foregoing, it is,

ORDERED that plaintiff's motion for a preliminary injunction, is denied in its entirety; and it is further,

ORDERED that counsel for defendants is directed to serve a copy of this Order with Notice of entry upon the plaintiff.

This constitutes the Decision and Order of the Court.

Dated: 12/6/13



PAUL WOOTEN J.S.C.

1. Check one:

2. Check if appropriate:..... MOTION IS:

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| ☒ CASE DISPOSED | ☐ NON-FINAL DISPOSITION |
| ☐ GRANTED ☒ DENIED | ☐ GRANTED IN PART ☐ OTHER |
| ☐ SETTLE ORDER | ☐ SUBMIT ORDER |
| ☐ DO NOT POST | ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE |