

ADSCAS LLC v 9 Clinton St. LLC

2014 NY Slip Op 30250(U)

January 24, 2014

Supreme Court, New York County

Docket Number: 652097/12

Judge: Ellen M. Coin

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NYSCEF DOC. NO. 63

RECEIVED NYSCEF: 01/28/2014

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

PRESENT: COIN
HON. ELLEN M. COIN Justice

PART 63

ADSCAS
- v -
9 CLINTON ST

INDEX NO. 652097/12
MOTION DATE _____
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION AND CROSS-MOTION(S) ARE
DECIDED IN ACCORDANCE WITH ANNEXED
DECISION AND ORDER.**

*This constitutes the decision and
order of the court*

Dated: 1/24/14

EW
HON. ELLEN M. COIN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 63

-----X
ADSCAS LLC,

Plaintiff,

INDEX NO. 652097/2012
MOTION DATE August 22, 2013
MOTION SEQ. NO. 003
E-FILED

-against-

9 CLINTON STREET LLC,

Defendant.

-----X

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Papers considered in review of this motion for a *Yellowstone* injunction and motion to add third-party defendants:

Papers	Numbered
Notice of Motion-Affidavits-Exhibits.....	1
Opposition and Cross-Motion.....	2
Reply and Opposition to Cross-Motion.....	3

ELLEN M. COIN, J.:

Upon the foregoing papers, it is ORDERED that plaintiff's motion for a *Yellowstone* injunction is denied. It is further ORDERED that defendant's cross-motion to add three individuals as third-party defendants is denied.

Plaintiff's Motion for a *Yellowstone* Injunction

Defendant sent a Notice to Cure to plaintiff on July 8, 2013 ordering plaintiff to cease live performances, performances after

10pm, and amplified music. The Notice to Cure expired on July 31, 2013. Plaintiff e-filed a proposed order to show cause requesting a *Yellowstone* injunction and temporary restraining order on July 31, 2013 at about 6pm. The Court signed the order to show cause on August 2, 2013.

Application for the Yellowstone Injunction is Not Timely

A tenant may obtain a *Yellowstone* injunction when four conditions are met: (1) plaintiff holds a commercial lease; (2) it received a notice of default or to cure or a threat of termination of the lease; (3) it requests injunctive relief prior to the end of the cure period and prior to termination of the lease; (4) it is ready, willing, and able to cure any default by any means short of vacating the premises. (See generally *First Nat. Stores, Inc. v Yellowstone Shopping Ctr., Inc.*, 21 NY2d 630 [1968]; see also *225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421 [1st Dept 1995]).

Defendant argues that plaintiff's request for a *Yellowstone* injunction should not be granted because it was untimely, thereby failing to meet the third requisite factor. Defendant argues that the Court heard the motion and signed an order to show cause only after the cure period ended, and thus the Court did not have jurisdiction to grant the injunction. The Court agrees and consequently must deny plaintiff's motion for a *Yellowstone* injunction.

A tenant must "move" for or "request" such relief prior to expiration of the cure period. (*Prince Fashions, Inc. v 542 Holding Corp.*, 15 AD3d 214, 215 [1st Dept 2005]; *Korova Milk Bar of White Plains, Inc. v PRE Properties, LLC*, 70 AD3d 646, 647 [2d Dept 2010]; *Daashur Assoc. v December Artists Apt. Corp.*, 226 AD2d 114, 114-15 [1st Dept 1996]).

"A motion is an application for an order. A motion on notice is made when a notice of the motion or an order to show cause is served." (CPLR 2211). "The order to show cause procedure is nothing more than an alternative way of bringing on a contested motion, so that the motion is deemed 'made' only when the order to show cause, signed by the judge and handed back to the applicant, is then served on the other side in accordance with the judge's prescribed method of service." (Patrick M. Connors, *Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C2211:5*; see *Voice Communications, Inc. v Bello*, 12 Misc 3d 318, 320 [Sup Ct, Nassau County 2006] ("Delivery of an order to show cause to the courthouse for signature is not the equivalent of making a motion"))).

The order to show cause containing a request for a Yellowstone injunction is timely only when signed by the motion court prior to the end of both the cure period and the issuance of the notice of termination. (See *JH Parking Corp. v East 112th Realty Corp.*, 298 AD2d 258, 258 [1st Dept 2002]; see also *King*

Party Ctr. of Pitkin Ave., Inc. v Minco Realty, L.L.C., 286 AD2d 373, 374 [2nd Dept 2001]). *Yellowstone* itself states that a temporary restraining order is only effective as of the date it is actually obtained. (*Yellowstone*, 21 NY2d at 637). Here, although plaintiff e-filed the proposed order to show cause in a timely fashion, it failed to deliver it to the Court for signature until after the cure period had expired.

Plaintiff's argument that the e-filing date must be the date of relevance, with no alternative remaining for parties outside of business hours, fails. The New York State Supreme Court has procedures in place for emergency applications after hours, which plaintiff failed to implement.

No Exception to the Timeliness Requirement Applies

There is no exception to the timeliness requirement that applies here. Where a lease provides for the tenant to satisfy its obligations under a notice to cure by diligently commencing cure of alleged defaults and where the nature of a default makes it incapable of full cure within the time specified in the cure period, a tenant may still obtain a *Yellowstone* injunction, even after the cure period, if he begins to cure the default in good faith. (*Village Ctr. for Care v Sligo Realty & Serv. Corp.*, 95 AD3d 219, 223 [1st Dept 2012]; *Becker Parkin Dental Supply Co., Inc. v 450 Westside Partners, L.L.C.*, 284 AD2d 112, 112 [1st Dept 2001]).

While Paragraph 17 of the parties' lease contains such a provision, here plaintiff did not begin any efforts to cure the alleged default. Although plaintiff provides evidence that it ceased live performances, this only occurred as of August 19, 2013, after the cure period had expired (Exh.1 to O'Donoghue Aff. in Opp.). Further, such violation was certainly capable of being cured within the cure period simply by cancelling such performances. The Court thus finds that plaintiff did not make good faith efforts to comply with the notice to cure during the cure period.

No Equitable Remedy Exists If a Yellowstone Injunction is Inappropriate

Preliminary injunctive relief is not an alternative equitable remedy when a Yellowstone injunction is improper due to untimeliness. (*Manhattan Parking Sys.-Serv. Corp. v Murray House Owners Corp.*, 211 AD2d 534 [1st Dept 1995]). Here, the Yellowstone injunction is denied as untimely. Therefore, the Court has no alternative mechanism for granting plaintiff a preliminary injunction.

Relationship of Motion to Underlying Petition and Willingness to Cure

As the application for a Yellowstone injunction is untimely, the Court need not address defendant's remaining arguments.

Defendant's Cross-Motion to Commence a Third-Party Action

In its answer, defendant asserted four counterclaims against

plaintiff for attorneys' fees, electricity, and rent. Defendant cross-moves to implead three individuals, Aryeh Stern, Cole Schaffer, and Richard Porichis, as third-party defendants on defendant's counterclaims. The three individuals signed a Good Guy guarantee in conjunction with plaintiff's lease with defendant.

"The guiding principles of third-party practice are convenience, efficiency, and economical determination of related liability." (Weinstein, Korn & Miller, New York Civil Practice, 2d ed.: CPLR §1007.02). To engage in third-party practice, defendant must file and serve a third-party summons and complaint "against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant." (CPLR §1007). Because here the individual guarantors are not alleged to owe defendant a duty of indemnification or contribution and because defendant does not assert against the guarantors any claim arising out of defendant's own alleged liability, defendant is required to bring a separate action against the three guarantors on its direct claims for the tenant's breach of the lease agreement.

This constitutes the decision and order of the Court.

Dated: 1/24/14, 2014

ENTER:



Ellen M. Coin, A.J.S.C.