

New World Food Court, Inc. v New World Mall, LLC
2014 NY Slip Op 30547(U)
January 8, 2014
Sup Ct, Queens County
Docket Number: 703038/2013
Judge: Robert J. McDonald
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MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - **IAS PART 34**

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NEW WORLD FOOD COURT, INC., NEW WORLD
GARAGE, INC., J MART GROUP, INC., and NEW
WORLD SHOPPING CENTER, INC.,

BY: McDONALD, J.

Index No.: 703038/13

Plaintiffs,

Motion Date: 10/15/13

- against -

Motion Cal. No.: 147

Motion Seq. No.: 2

NEW WORLD MALL, LLC,

Defendants.

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Plaintiff New World Food Court, Inc., plaintiff New World
Garage, Inc., plaintiff J Mart Group, Inc., and plaintiff New
World Shopping Center, Inc. have moved for a Yellowstone
injunction. Defendant New World Mall, LLC has cross moved for an
order, inter alia, directing the plaintiffs to turn over keys to
the freight elevator.

The plaintiffs, who are subtenants, rent floors in a
commercial premises known as 136-20 to 136-30 Roosevelt Avenue
and 40 -17 to 40-21 Main Street, Flushing, New York from the
defendant. (The building, having four floors, a basement, and a
sub-basement, is L-shaped.) The defendant is the net lessee
under a master lease with Alexander's of Flushing, Inc. The
defendant converted the building into a shopping center or mall
which contains more than one hundred stores and food
establishments in approximately one hundred thousand square feet
of retail space. The plaintiffs are the subtenants of the first
floor, second floor, cellar, and two subcellar floors, and the
plaintiffs, in turn, sub-sublease and license partitioned units
in their respective leased floors to merchants, stores, food
vendors, and other retail establishments. These sub-subtenants
require daily delivery of products and must use the freight
elevator.

In or about December, 2010, prior to the opening of the
mall, Tianji Li, who holds a majority interest in the defendant,
sold his 25% interest in each of the plaintiff subtenants. The
mall opened in May, 2011, and soon after, Li ousted the

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QUEENS COUNTY

defendant's other managing member, Lian Wu Shao, from the management of the mall. Li's allegedly unlawful purchase of Sam Chang's interest in the defendant and removal of Shao as a managing member of the defendant became the subject of a lawsuit pending before the New York State Supreme Court, County of New York (*Shao v. Li*, New York County Index No. 651886/11). Pursuant to a decision dated July 9, 2013, the Honorable Charles Ramos granted plaintiff Shao's motion for summary judgment to the extent of finding liability under the plaintiff's first cause of action for breach of contract (The court found that Chang's transfer of his interest in the defendant to Li was in breach of the operating agreement.) Shao and his wife are part owners of each of the plaintiff subtenants, and the acrimony between Li and Shao has allegedly caused a breakdown in the relationship of the sublandlord and plaintiff subtenants.

The plaintiffs have obtained seven prior Yellowstone injunctions, and they have also obtained a preliminary injunction prohibiting the defendant from interfering with the plaintiffs' use of passenger elevators.

The plaintiffs began the instant lawsuit after the defendant served upon them four notices to cure defaults dated August 21, 2013. The notices to cure were based on the alleged failure of the plaintiffs to provide the defendant sublandlord with keys and access codes to the mall's freight elevator and mechanical rooms in violation of paragraph 13 of the subleases.

The plaintiffs allege that Li does not really want the key to the freight elevator for the purpose of repairing it; he allegedly wants the key to keep the plaintiffs from using it, thereby inflicting harm on the stores and restaurants in the building. Li has also allegedly refused to make repairs to passenger elevators and escalators. The freight elevator broke down in 2011, and Li allegedly ignored a court order to make repairs to it. (See, *Grand Restaurant Group, Inc. v. New World Mall, LLC*, Queens County Index No. 19560/11, McDonald, J.) The plaintiffs eventually spent \$25,000 of their own money to make the repairs. They have allegedly continued to maintain the freight elevator at their own expense, and they installed new locks on it. The defendant has allegedly retained no space in the mall and has no substantial reason for needing the keys.

The plaintiffs originally began this case in the New York State Supreme Court, County of New York, where the Honorable Charles Ramos was the assigned justice, but the parties stipulated to a change in venue on or about July 29, 2013. The case was assigned to this court, before which related cases were

brought.

"The purpose of a Yellowstone injunction is to enable a tenant confronted by a notice of default, a notice to cure, or 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 ***." (*M.B.S. Love Unlimited, Inc. v. Jaclyn Realty Associates*, 215 AD2d 537, 538; see, *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates*, 93 NY2d 508; *Trump on the Ocean, LLC v. Ash*, 81 AD3d 713.) Having such a purpose, a Yellowstone injunction may issue even though the applicant has not made the usual tripartite showing for obtaining provisional relief. (See, *Post v. 120 East End Ave. Corp.*, 62 NY2d 19; *Trump on the Ocean, LLC v. Ash*, *supra*; *225 East 36th Street Garage Corp. v. 221 East 36th Owners Corp.*, 211 AD2d 420; *Lexington Ave. & 42nd Street Corp. v. 380 Lexchamp Operating, Inc.*, 205 AD2d 421; *Matter of Langfur*, 198 AD2d 355; *Heavy Cream, Inc. v. Kurtz*, 146 AD2d 672.) "A tenant requesting a Yellowstone injunction must demonstrate that: (1) it holds a commercial lease, (2) it received from the landlord either 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 ***." (*Trump on the Ocean, LLC v. Ash*, *supra*, 716; *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates*, *supra*; *Chai & Tantrakoon, Inc. v. Royal Realty Corp.*, 246 AD2d 398; *Lexington Ave. & 42nd Street Corp. v. 380 Lexchamp Operating, Inc.*, *supra*.) The plaintiffs herein have made an adequate showing of their entitlement to a Yellowstone injunction. (See, *Chai & Tantrakoon, Inc. v. Royal Realty Corp.*, *supra*.) Although factual issues may exist in this case, they do not in themselves preclude the issuance of a preliminary injunction. (See, CPLR 6312[c]; *Egan v. New York Care Plus Ins. Co.*, 266 AD2d 600.)

Accordingly, the plaintiffs' motion for a Yellowstone injunction is granted. The parties may submit affidavits concerning the proper amount of the undertaking at the time of the settlement of the order to be entered hereon.

In regard to the defendant's cross motion, the defendant purports to need the keys to the freight elevator so that it can comply with the court's prior order directing the defendant to make repairs. However, the plaintiffs have alleged without contradiction that they have already spend \$25,000 of their own

money to make the repairs and have assumed the obligation to maintain the elevator. The stated grounds for the cross motion have no merit and, considering the history of the parties, may even be contrived. Nevertheless, the court perceives and is concerned about possible safety issues in this multi-story building used by the public if the landlord or some other responsible party does not have control over the keys to the freight elevator, mechanical rooms, equipment rooms, etc. The parties did not address these issues, and the defendant may renew its cross motion upon papers discussing the matter.

Accordingly, the cross motion is denied without prejudice to renewal.

Settle order.

Dated: Long Island City, N.Y.
January 8, 2014



ROBERT J. McDONALD
J.S.C.