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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 57

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BOULEVARD BISTRO, LLC,

Plaintiff,

Index No. 153896/2014

-against-

GISELLE ALLARD,

Defendant.

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Peter H. Moulton, J.:

Plaintiff, which leases commercial space from defendant for a restaurant, moves for a *Yellowstone* injunction tolling its time to cure defaults alleged in a default notice dated April 7, 2014. Defendant opposes the application on the grounds that plaintiff has made extensive alterations to the space without proper permits and that the City Landmarks Preservation Commission has sent her correspondence that raises the possibility of fines for certain alterations. Defendant also complains that plaintiff has chronically fallen behind in the rent during the course of the tenancy. Plaintiff contends that some of the alleged defaults are fictive, and that it has substantially cured the remainder.

Discussion

A *Yellowstone* injunction is derived from the seminal case of *First National Stores, Inc. v Yellowstone Shopping Center, Inc.* (21 NY2d 630 [1968]).

> A *Yellowstone* injunction maintains 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 by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture.

Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Avenue Associates, 93 NY2d 508, 514 (1999). The party seeking *Yellowstone* relief must establish 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 [internal quotation marks and citation omitted].

Id.; *see also Purdue Pharma, LP v Ardsley Partners, LP*, 5 AD3d 654 (2d Dept 2004). Unlike a preliminary injunction under CPLR Article 63, the plaintiff does not have to show a likelihood of success on the merits. *WPA/Partners LLC v Port Imperial Ferry Corp.*, 307 AD2d 234 (1st Dept 2003); *Stuart v D & D Associates*, 160 AD2d 547 (1st Dept 1990). However, a plaintiff must demonstrate that "a basis exists for believing that a tenant ... has the ability [to] cure through any means short of vacating the premises [internal quotation marks and citation omitted]." *WPA/Partners LLC*, 307 AD2d at 237; *see also Jemaltown of 125th Street v Leon Betesh/Park Seen Realty Associates*, 115 AD2d 381 (1st Dept 1985).

Plaintiff has demonstrated a willingness to cure the alleged violations, and defendant's statements concerning chronic nonpayment of rent appear to be exaggerated. The court grants a Yellowstone injunction on the following conditions.

By May 30, 2014, Plaintiff shall provide defendant with

reasonable access to investigate 1) the alleged damaged beam (Item 3 in the Notice to Cure), 2) the alleged removal of a "support beam, near the main staircase" (Item 4), and 3) the exhaust on the back of the building (Item 8). To the extent it has not already done so, plaintiff shall provide defendant by May 30, 2014, with a copy of a policy of insurance demonstrating that defendant is currently an additional insured as provided in the parties' lease. By May 30, 2014, the plaintiff's principal shall provide an affidavit concerning the alleged sublet. The affidavit shall state in detail the status of Carlos Swepson with respect to plaintiff's ownership and business. The parties shall cooperate in addressing the concerns of the Landmarks Preservation Commission.

Plaintiff is also directed to post an undertaking. *See* CPLR 6312 (b); *Cohn v White Oak Co-op. Housing Corp.*, 243 AD2d 440 (2d Dept 1997)(improper to fail to order undertaking in motion for *Yellowstone* injunction). The amount of the undertaking should be "rationally related to the quantum of damages which [defendant] would sustain in the event that [plaintiff] is later determined not to have been entitled to the injunction." *61 West 62nd Owners Corp. v Harkness Apartment Owners Corp.*, 173 AD2d 372, 373 (1st Dept 1991). The undertaking is set at the sum of $20,000.

Accordingly, it is

ORDERED that Plaintiff's motion for a *Yellowstone* injunction is granted on the conditions set forth above, and the period in which to cure any alleged lease defaults under the Lease is tolled pending the

completion of this action or further order of this Court; and it is further

ORDERED that Defendant, 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 an attorney, agent, servant, employee or other person under the supervision of control of Defendant or otherwise, from taking any action to terminate Plaintiff's leasehold, or interfere in Plaintiff's interests in, and enjoyment of, the leasehold; and it is further

ORDERED that the undertaking is fixed in the sum of $20,000 conditioned that the Plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to the Defendant all damages and costs which may be sustained by reason of this injunction.

Dated: May 15, 2014

ENTER:

J.S.C.

HON. PETER H. MOULTON
SUPREME COURT JUSTICE