

**P.J. Clarke's On the Hudson LLC v WFP Retail Co.,
L.P.**

2014 NY Slip Op 31864(U)

July 17, 2014

Supreme Court, New York County

Docket Number: 155617/2014

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

P.J. CLARKE'S ON THE HUDSON LLC and THE
CLARKES' GROUP LLC,

Plaintiffs,

Index No.155617/2014

-against-

DECISION/ORDER

WFP RETAIL CO., L.P.,

Defendant.

-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff tenant P.J. Clark's on the Hudson LLC ("Tenant") has brought the present motion for a Yellowstone injunction tolling and enjoining the running of the cure period set forth in the landlord WFP Retail Co., L.P.'s ("Landlord") notice to cure dated June 3, 2014 (the "Notice to Cure") and enjoining defendant from terminating the lease based on the Notice to Cure. As will be explained more fully below, the motion is granted to the extent stated herein.

The relevant facts are as follows. By Agreement of Lease dated December 30, 2004, (the "Lease"), Tenant leased commercial space from Landlord on the street level of 250 Vessey Street, located in the World Financial Center. The Lease was amended by First Lease Modification Agreement dated as of July 29, 2005 (the "First Amendment"). In the First

Amendment, Tenant leased additional space on the lobby level. In 2011, the Landlord announced a major expansion and redevelopment of the retail portion of the World Financial Center (the "Expansion"). In contemplation of this Expansion, the Landlord and Tenant entered into a January 23, 2013 Second Lease Modification Agreement (the "Second Amendment"), whereby the Tenant acknowledged that the Landlord was going to be performing renovations and modifications to the retail areas of the World Financial Center. Pursuant to the Second Amendment, Tenant extended its Lease term for approximately five years and Tenant was granted certain concessions based on the Expansion taking place.

On June 3, 2014, Landlord served the Tenant with the Notice to Cure, demanding payment of \$483,176.98 in rent arrears by June 16, 2014. In response to the Notice to Cure, Tenant commenced the present action in which it seeks a Yellowstone injunction tolling its time to cure and also seeks \$40 million in damages based on Landlord's action taken in connection with the Expansion of the retail portion of the World Financial Center. The Tenant alleges in the complaint that Landlord has breached the Lease and embarked on a deliberate and bad faith effort to force Tenant to vacate the leased premises by preventing access to Tenant's premises and otherwise driving away Tenant's customer base. It alleges that "Landlord's ongoing performance of its construction work and renovations, which commenced October of 2012, have been and are being performed in a manner designed to interfere with, interrupt and otherwise destroy Tenant's ability to conduct business in the Premises and to cause Tenant to lose revenue and suffer enormous monetary and reputational damage." Scotti Affidavit, paragraph 7.

The purpose of a Yellowstone injunction is to extend the cure period, thereby preserving the lease until the merits of the dispute can be resolved. *See Graubard Mollen Horowitz*

Pomeranz & Shapiro v 600 Third Ave. Assocs., 93 N.Y.2d 508, 514 (1999). “The party 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.” *See id.*

In the instant case, the court finds that plaintiff Tenant is entitled to a Yellowstone injunction conditioned on its depositing all rent arrears specified in the Notice to Cure in a jointly held escrow account with the Landlord and continuing to deposit a sum equal to the monthly rent into the escrow account pending the determination of this action. It is undisputed that the Tenant holds a commercial lease, that it received from the Landlord a notice to cure and that it requested injunctive relief prior to the termination of the Lease. The court also finds that Tenant can establish that it has the ability to cure short of vacating the premises if it is able to meet the condition of this Yellowstone injunction that it deposit all rent arrears and the monthly rent amount specified under the Lease in a jointly held escrow account. In its moving papers, Tenant alleges in a conclusory fashion that it is ready, willing and able to pay the rental arrears if it is found to owe rent to the Landlord. In response, Landlord alleges that Tenant has failed to establish that it has the ability to cure. In its reply papers, plaintiff alleges for the first time that it can and will issue a cash call to its members to obtain the necessary funds to pay the outstanding rent. Based on the foregoing, this court finds that the only way that the Tenant can sufficiently establish its ability to cure is by depositing all rental arrears and the monthly rent amount in escrow pending the determination of this matter. This condition is particularly appropriate in the

present case where the central issue in dispute is the Tenant's failure to pay rent for the premises. Although the court would normally require the tenant to pay all rental arrears and ongoing use and occupancy to the landlord as a condition to granting a Yellowstone injunction, that relief would be inappropriate as the payment of rent is the ultimate issue to be decided in this case. However, it is fair for the Landlord to have some protection in the form of the rental arrears being held in escrow in the event that a finding is ultimately made that the Tenant is not entitled to recover from Landlord.

The Landlord's argument that the Tenant is not entitled to a Yellowstone injunction because it is in breach of the lease based on its failure to pay rent due under the Lease is without merit. The First Department has specifically held that "Yellowstone relief is proper even when nonpayment of rent is the only issue." *3636 Greystone Owners Corp.*, 4 A.D.3d122, 123 (1st Dept 2004). Moreover, the First Department has also recognized that the "tenant's claim for damages as a result of the landlord's breach of the lease in excess of the unpaid rent claimed as the basis for the landlord's election to terminate the lease, may provide an equitable defense to the holdover proceeding." *Moore v. Chase Manhattan Bank*, 217 A.D.2d 419 (1st Dept 1995); *see also Linden Blvd. v. Elota Realty Co.*, 196 A.D.2d 808, 811 (2nd Dept 1993) (although failure to make repairs is not a legal defense to claim for rent in a holdover proceeding, tenant is not precluded from raising as an equitable defense that by reason of the Landlord's breach of its obligation to make repairs, it has suffered damages in excess of the unpaid rent claimed as the basis for the election to terminate the lease). Thus, the Tenant is not precluded from seeking a Yellowstone injunction on the ground that the Notice to Cure is based on nonpayment of rent.

Moreover, the case of *Excel Graphics Technologies Inc. v. CFG/AGSCB 75 Ninth*

