

500-512 Seventh Ave. Ltd. Partnership v 500 Seventh Ave. LLC
2015 NY Slip Op 31199(U)
July 10, 2015
Supreme Court, New York County
Docket Number: 152948/15
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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500-512 SEVENTH AVENUE LIMITED
PARTNERSHIP,

Plaintiff,

-against-

Index No. 152948/15

500 SEVENTH AVENUE LLC,

Defendant.

-----X
CAROL R. EDMEAD, J.

Plaintiff 500-512 Seventh Avenue Limited Partnership (Partnership) moves for a *Yellowstone* injunction barring defendant from taking any steps to terminate Partnership’s lease or tenancy, and tolling the time to cure set forth in defendant’s “Sixty (60) Day Notice to Cure” (Notice), dated December 22, 2014. Partnership is the tenant, under a ground lease (Lease), of the commercial property consisting of the office buildings located at 500-512 Seventh Avenue and 228 West 38th Street in Manhattan, and of the land beneath those buildings. Defendant is the fee owner of the land. The Lease, dated May 1, 1957, was entered into by Partnership’s and defendant’s predecessors-in-interest and is currently due to expire on May 1, 2045.

As an initial matter, defendant’s April 24, 2015 request for an undertaking in the amount of \$487,500.00 per year, in the event that the injunction is granted, is untimely, inasmuch as such request was due no later than April 23, 2015. Moreover, it is indisputable that plaintiff has made costly improvements that will inure to the benefit of defendant. *See Voci* reply affidavit, 2. In such circumstances, a *Yellowstone* injunction may be granted without the posting of any

undertaking. *WPA/Partners v Port Imperial Ferry Corp.*, 307 AD2d 234, 237 (1st Dept 2003); *John A. Reisenbach Charter School v Wolfson*, 298 AD2d 224, 224 (1st Dept 2002), citing *Kuo Po Trading Co. v Tsung Tsin Assn.*, 273 AD2d 111 (1st Dept 2000).

“[T]he purpose of a Yellowstone injunction is to allow a tenant confronted by a threat of termination of the lease to obtain a stay . . . so that, after a determination on the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold.” *C C Vending, Inc. v Berkeley Educ. Servs. of N.Y., Inc.* 74 AD3d 559,559 (1st Dept 2010), quoting *Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225, 227 (1st Dept 1997). A party seeking a *Yellowstone* injunction must show 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.”

Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc., 93 NY2d 508, 514 (1999), quoting *225 E. 36th St. Garage Corp. v 221 E. 36th St. Owners Corp.*, 211 AD2d 420, 421 (1st Dept 1995); see also *Aegis Holding Lipstick LLC v Metropolitan 885 Third Ave. Leasehold LLC*, 95 AD3d 708, 708 (1st Dept 2012). Plaintiff undisputedly satisfies the first three of those conditions. As to the fourth, plaintiff contends that, upon receipt of the Notice, it immediately investigated the violations alleged therein, took steps to remove those violations that were capable of immediate cure, and as to the others, is diligently performing corrective work. See Voce affidavit. In brief, plaintiff claims that it has cured 20 of the 39 violations alleged in the Notice, and that another of the 39 is erroneous.

Defendant’s sole argument in opposition to the motion is the assertion that plaintiff

defaulted at the Environmental Control Board (ECB) hearings pertaining to three of the 20 violations that plaintiff claims to have resolved; that one of the hearings resulted in plaintiff being held in violation; and that, because plaintiff states that in, all four cases, a hearing was held, it is guilty of misrepresentation, has unclean hands, and may not seek injunctive relief. *See generally ERS Enterprises v Empire Holdings*, 286 AD2d 206, 207 (1st Dept 2001).

All four of the printouts of ECB records that defendant has presented show that the status of the violations alleged therein is “paid in full.” Sigal affirmation, exhibit 1. Defendant gives no reason why defendant should have appeared at hearings pertaining to violations that it did not contest. Nor does defendant contend that the 20 violations that plaintiff claims to have cured have not, in fact, been cleared of record. Nor, finally, does defendant explain how plaintiff’s absence from three hearings renders its statement, that those hearings were held, a misrepresentation. Clearly, in each of those three cases, there was an adjudication that set the penalty that plaintiff subsequently paid.

Accordingly, it is hereby

ORDERED that plaintiff 500-512 Seventh Avenue Limited Partnership’s motion for a *Yellowstone* injunction is granted; and it is further

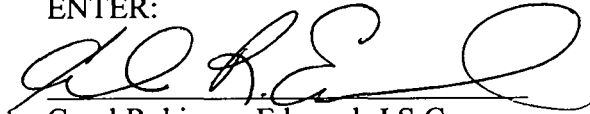
ORDERED that defendant 500 Seventh Avenue LLC and its employees, servants, agents, attorneys, affiliates, partners and all other persons acting on its behalf are enjoined and restrained from taking any steps to terminate plaintiff’s tenancy based upon defendant’s “Sixty (60) Day Notice to Cure,” dated December 22, 2014, or taking any action to terminate plaintiff’s ground lease with respect to the premises located at 500-512 Seventh Avenue and 228 West 38th Street, New York, NY 10018 by, without limitation, serving any termination notice or commencing

summary proceedings, or taking any action to oust plaintiff from said premises; and it is further

ORDERED that the time of plaintiff to cure any default under the said notice to cure is tolled until such time as this court has determined that such default has occurred and plaintiff has had at least 30 days after the service, with notice of entry, of a copy of the order determining this action, to cure or to commence to cure, and, thereafter, to diligently proceed to cure any default as may be found by this court.

Dated: July 10, 2015

ENTER:

A handwritten signature in black ink, appearing to read 'C.R. Edmead', written over a horizontal line.

Carol Robinson Edmead, J.S.C.