

Islip Theaters, LLC v Landmark Plaza Props., Corp.
2015 NY Slip Op 31948(U)
September 23, 2015
Supreme Court, Suffolk County
Docket Number: 012315-2015
Judge: John H. Rouse
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INDEX NO. 012315-2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 09/09/15
ADJ. DATE:
Mot. Seq. 001-ADJ. to 11/18/15

MOTION DATE: 08/26/15
ADJ. DATE: 09/09/15
Mot. Seq. 002-MD

ISLIP THEATERS, LLC,

Plaintiffs

-against-

DECISION & ORDER

LANDMARK PLAZA PROPERTIES, CORP.,

Defendants

TO:

WILLIAM R. GARBARINO, ESQ.
40 MAIN ST., PO BOX 717
SAYVILLE, NY 11782
631-563-4411

CERTILMAN BALIN ADLER & HYMAN
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EAST MEADOW, NY 11554
516-296-7000

Upon the reading and filing of the following papers in this matter:

Mot. Seq. #001: (1) Order to Show Cause granted by the Hon. Emily Pines on July 17, 2015; Affidavit of James Kern sworn on July 16, 2015; the Affirmation of Donald R. Hamil, Esq. affirmed on July 16, 2015 and Exhibits A-F attached thereto; with provided for a temporary restraining order pending a determination on Plaintiff's application for Yellowstone Injunction; (2) Affidavit in Opposition to Plaintiff's Motion for a Yellowstone Injunction by Rosemary Perry sworn on August 21, 2015 and Exhibits A-R attached thereto; Memorandum of Law in Opposition to Plaintiff's Motion for a Yellowstone Injunction; (3) Reply Affidavit by Matthew

Latten sworn on September 4, 2015; Affirmation in Reply by Donald R. Hamill, Esq., affirmed on September 4, 2015 and Exhibits G-S attached thereto.

Mot. Seq. #002 Order to Show Cause granted by the Hon. Peter H. Mayer on August 12, 2015 requiring the Plaintiff to Show Cause why an order should not be made enjoining the Plaintiff from removing fixtures from the premises; requiring the Plaintiff to insure that insurance not lapse or be cancelled until the resolution of cases filed under Index No. 012315/2015 and 005631/2015; Affirmation of Elizabeth E. Schlissel, Esq. Affirmed on August 11, 2015; Affidavit of Rosemary Perry sworn on August 10, 2015 and Exhibits A-C attached thereto; Memorandum of Law by Defendant in Support of Temporary Restraining Order and Preliminary Injunction

it is:

ORDERED that Mot. Seq. 001 is adjourned to November 18, 2015; and it is further

ORDERED that Mot. Seq. 002 is denied; and it is further

ORDERED that Plaintiff is directed to serve upon the Defendant on or before **October 21, 2015** a schedule of repair / maintenance work that has been demanded by the Landlord and that Plaintiff agrees is the obligation of the tenant to perform under the terms of the lease, and further provide in this schedule a date by which Tenant agrees each separate repair can be completed, unless the need for an extension can be demonstrated, upon good cause shown, by the Tenant (Hereinafter "**Tenant's Schedule of Repairs**"); and it is further

ORDERED that Defendant on or before **October 28, 2015** is directed to serve upon the Plaintiff a schedule of any repairs / maintenance that Plaintiff has not included on the Tenant's Schedule of Repairs which the Defendant contends are required under the lease agreement with specific identification of the provision in the lease that requires Tenant to perform said repair, and a date by which, absent good cause shown, it is reasonable for such repair to be effected (Hereinafter "**Landlord's Schedule of Repairs**"); and it is further

ORDERED that Plaintiff, on or before **November 4, 2015**, is directed to serve upon the Defendant his objections to those items on the Landlord's Schedule of Repairs, and the specific lease provision that it contends demonstrates said repair is not an obligation of the Tenant, or if it concedes it is an obligation of the Tenant but proposes a later date as reasonable to provide such a date; and it is further

ORDERED Defendant, on or before **October 21, 2015**, is directed to provide a complete accounting, verified in accordance with CPLR § 3020, for the property taxes it has paid for the leased premises for each year of the lease from the inception of the lease to date, and all reductions of taxes that have taken place, the effective date of such reduction, and the total amount overpaid by the Tenant occasioned by said reductions in property tax due as rent under

the terms of the lease. (Hereinafter “**Landlord’s Accounting of Property Taxes**”); and it is further

ORDERED that the motion (Seq. #001) by Plaintiff for a Preliminary Injunction shall be adjourned by the Clerk of the Court to November 18, 2015; and it is further

ORDERED that the Court will hold a **hearing on the Plaintiff’s motion for Preliminary Injunction (Seq. #001) Wednesday, November 18, 2015 at 2:00 p.m.** in the afternoon in Part 12 located on the second floor of Supreme Court Annex, 1 Court Street, Riverhead, New York; and it is further

ORDERED that counsel are directed, on Wednesday, November 18, 2015 at 2:00 p.m., to bring such evidence and produce those witnesses each deems necessary to present to the court upon the issues on Plaintiff’s motion for a preliminary injunction; and it is further

ORDERED that counsel for the Plaintiff is directed to bring with him to the hearing on the Preliminary Injunction a copy of the pleadings in the action under Suffolk County Index Number 005631/2015 so that the Court may consider such oral motion as may then be made, at the election of either party, for consolidation of the two actions; and it is further

ORDERED that counsel are directed to bring to the hearing the Schedules and Accounting as herein ordered by the Court; and it is further

ORDERED that counsel for the Plaintiff and the Defendant are directed to maintain records of the time spent on behalf of their respective clients as to each issue such that the Court may, if required by 22 NYCRR Part 130, after proper motion by either party, impose sanctions for frivolous conduct in this litigation; and it is further

ORDERED that the foregoing schedule of reports, and the hearing on the Preliminary Injunction may be modified upon the written consent of the parties with a copy of that consent sent to the Court by facsimile transmission to 631-852-3226; and it is further

ORDERED that counsel are encouraged to take all reasonable steps to resolve past disputes, anticipate future disputes and reach a written settlement, if possible, that is acceptable to the parties that will facilitate an enduring resolution to the parties’ differences.

DECISION

Plaintiff by Order to Show Cause has made application to this Court for a Yellowstone injunction to prevent the termination of its commercial lease. *First Nat’l. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 (1968).

"To obtain a Yellowstone injunction, the tenant 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 both the termination of the lease and the expiration of the cure period set forth in the lease and the landlord's notice to cure, and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises"

JT Queens Carwash, Inc. v 88-16 N. Blvd., LLC, 101 A.D.3d 1089 (2nd Dept., 2012), citations omitted.

On November 2, 2006 the Plaintiff entered into a commercial lease for a period of twenty years. *See Exhibit A attached to Plaintiff's Order to Show Cause.* Plaintiff received a ten day Notice of Default and Cure dated July 8, 2015 from the Defendant. *See Exhibit D attached to Plaintiff's Order to Show Cause.* Plaintiff requested injunctive relief by Order to Show Cause granted on July 17, 2015, prior to the expiration of the cure period.

The only question of fact to be resolved upon this motion is what deficiencies in the premises must be repaired under the terms of the lease, whether the tenant is prepared and has the ability to cure under the terms of the lease; and if so, setting a reasonable time schedule for such cure to be effected.

The Court notes that the lease submitted to the court indicates that the tenant paid a security deposit of \$75,000.00. *See par. 35 of the lease.* The schedule of maintenance the Defendant claims is required under the lease, in the estimation of the Defendant, will cost \$40,370.00. Whether all of these items are obligations under the lease remains in dispute, as well as the cost of such repairs.

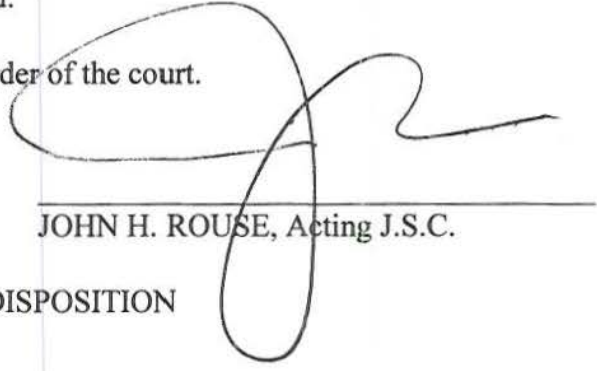
The Plaintiff-Tenant alleges that it learned that the Defendant-Landlord had secured a reduction in property taxes, that the Defendant-Landlord did not disclose this reduction to Plaintiff-Landlord. Plaintiff-Tenant then commenced an action under Suffolk County Index Number 005631/2015 and thereafter, the Landlord-Defendant served its ten day notice to cure. The Defendant-Landlord does not dispute this fact, but rather argues that under the terms of the lease such amounts due to the Tenant would be credited against future rent due. To the extend counsel can not effectively resolve this dispute between the litigants, a hearing is required.

The Defendant-Landlord has filed with this court a motion made by Order to Show Cause wherein Defendant-Landlord seeks injunctive relief to prevent the Plaintiff-Tenant from removing any fixtures from the premises, and further requiring the Plaintiff-Tenant to maintain insurance on the premises. The movant has given this court no reason to believe the tenant intends to remove any fixtures that belong to it. On the contrary, the Plaintiff-Tenant has undertaken substantial efforts to retain its tenancy in this movie theater which is has operated at least since 2006 when this twenty year lease began. Under the terms of the written lease, it is the obligation oft Landlord-Defendant to maintain insurance on the premises which is then charged

to the Plaintiff under the terms of this triple net lease. The motion by the Defendant-Landlord for a preliminary injunction is in every respect denied.

The foregoing shall constitute the decision and order of the court.

Dated: September 23, 2015



A handwritten signature in black ink, appearing to read 'John H. Rouse', is written over a horizontal line. The signature is stylized with a large loop and a long tail.

JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION