

**Queensboro Parking Corp. v Phipps Houses**

2015 NY Slip Op 32138(U)

October 15, 2015

Supreme Court, Queens County

Docket Number: 707661/2015

Judge: Thomas D. Raffaele

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS D. RAFFAELE IA Part 13

Justice

-----X  
QUEENSBORO PARKING CORP.,

Index No. 707661/2015

Plaintiff,

Motion Date: 9/8/15

-against-

Sequence No. 2

PHIPPS HOUSES, SUNNYSIDE-BARNETT  
ASSOCIATES, LLC., MANHATTAN PARKING  
GROUP, LLC, and SUNNYSIDE UP, LLC,

Defendants.

----- X  
The following papers numbered 1 to 9 read on this emergency order to show cause by plaintiff, Queensboro Parking Corp., for an order: (1) staying the purported "30 Day Notice to Terminate" and or vacating said notice and deeming it null and void and otherwise unenforceable for the duration of this action; (2) maintaining the *status quo* of plaintiff's lease (and use and occupancy of the premises governed thereby be maintained and deemed ongoing until further order of this court; and (3) enjoining any and all defendants from terminating plaintiff's lease for the commercial premises located at 50-25 Barnett Avenue, Sunnyside, New York 11104, on less than twelve (12) months minimum written notice to plaintiff as required by said lease.

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Upon the foregoing papers and oral argument conducted on September 17 and 18, 2015, the request for a preliminary injunction is denied.

Plaintiff seeks in its verified complaint, dated July 21, 2015, *inter alia*, a declaratory judgment and injunctive relief concerning the terms of a lease among the parties, originally executed on December 15, 1978 wherein plaintiff, Queensboro Parking Corp (QPC) was tenant and defendant Phipps House (PH) was landlord. This was a written commercial lease and rider

for a commercial property located at 50-25 Barnett Avenue, Long Island City, New York (the premises) and was utilized by plaintiff QPC, as a car parking garage. The lease is annexed to the verified complaint as Exhibit A. The original lease was for a five-year term, from December 15, 1978 to November 30, 1983 (The Original Lease, *see* Exhibit A to opposition papers). Thereafter there was a first lease extension for a ten-year period from December 1, 1988 to November 30, 1998 ( First Lease Extension, *see* Exhibit B to opposition papers). Thereafter, the parties extended the lease for an additional ten years from December 1, 1998 to November 30, 2008 (Second Lease Extension, *see* Exhibit C to opposition papers).

It is undisputed that the parties never executed a lease renewal or extension after the Second Lease Extension expired on November 30, 2008 (*see also* affidavit of Charles Gross, Assistant Vice-President of Commercial Leasing and Management for Phipps House Services, Inc.). Incidentally, Phipps Houses Services, Inc. is the managing agent for and a wholly-owned subsidiary of PH. Co-defendant, Sunnyside-Barnett Associates LLC is the present owner of the premises and is also wholly-owned by its sole member, PH. On June 24, 2014, title to the premises was transferred from PH to Sunnyside-Barnett Associates, LLC. It is further undisputed that plaintiff, QPC has remained in occupancy of the premises since November 30, 2008, the expiration of the Second Lease Extension, currently at the rate of \$20,000.00 per month.

The dispute herein arises from the interpretation of a clause in the Original Lease (*see* Exhibit B, p. 2 of verified complaint) which reads in relevant part:

It is further specifically understood and agreed that if Landlord decides in good faith to develop the property demised to the Tenant under said Lease, said Lease as extended, can be cancelled by Landlord upon twelve (12) month's prior written notice to Tenant which shall state the date upon which this Lease, as extended, shall terminate, and upon giving of written notice as aforesaid, the Lease, as extended, and term hereof shall terminate and expire as of the last day of the twelfth month after the notice of lease cancellation.

Plaintiff, tenant, QPC argues that this clause is in effect and the Thirty-Day Notice of Termination, dated July 24, 2015 served in Landlord and Tenant Court should be enjoined and stayed because the QPC should really have a twelve-month notice as outlined in the preceding paragraph. To bolster its argument QPC relies on a "Yellowstone-styled injunction" to immediately enjoin and stay the Thirty-Day Notice of Termination, served by the landlord on July 24, 2015 which purportedly terminated QPC's tenancy effective, August 31, 2015. In the case at bar, there was no Notice to Cure ever served. It is well settled that a *Yellowstone* injunction serves the limited purpose of tolling an applicable cure period to permit a commercial tenant additional time to cure a default and avoid the termination of the leasehold (*see Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508 [1999]).

This court finds that a *Yellowstone* injunction is not applicable in the case at bar, however, in the interest of justice and judicial economy, the court shall entertain QPC's application as one for an injunction, pursuant to CPLR Article 63. It is axiomatic that a preliminary injunction is a drastic remedy and should be issued cautiously (*see Uniformed Firefighters Assen of Greater New York v City of New York*, 79 NY2d 236, 241 [1992]). CPLR Section 6301 sets forth the requirements for a preliminary injunction as (1) a likelihood of success on the merits and (2) irreparable injury in the absence of an injunction and (3) a balancing of equities in plaintiffs' favor. It is well settled that irreparable harm is defined as any injury where monetary damages are not sufficient (*See Klein, Wagner & Morris v Lawrence A. Klein, P.C.* 186 AD2d 631 [2d Dept. 1992]). "Damages compensable in money and capable of calculation, albeit with some difficulty, are not irreparable" (*see Sports Channel America Assoc. V National Hockey League*, 186 AD2d 417 [1<sup>st</sup> Dept. 1992]).

Based on the foregoing, and the arguments on the record, this court finds that plaintiff is not entitled to a preliminary injunction. Initially, plaintiff has failed to establish a likelihood of success on the merits. This court finds that the clause in the Original Lease relative to a twelve-month notice to tenant is not applicable to the case at bar; since this court finds that QPC has been a month to month tenant since the expiration of the Second Lease Renewal on November 30, 2008 (*see Real Property Law (RPL) Section 232-c*). RPL 232-c reads in relevant part, that when a tenant holds over after the expiration of a lease then "[I]f the landlord shall accept rent for any period subsequent to the expiration of such term, then, unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such term." Accordingly, QPC is only required to receive a Thirty-Day Notice which was duly served by the landlord on July 24, 2015.

Notwithstanding the fact that this court holds that the lease is no longer in effect; since it was not renewed on November 30, 2008, QPC had in fact more than one year notice of the sale of the premises during the year-long negotiations between the parties regarding when QPC would move out (*see Hearing Transcript*, dated September 17, 2015 p. 10 lines 18-20). Moreover, the court further notes that the twelve-month notice requirement specifically states that it shall remain in effect if the lease is "extended." The lease was not extended after its expiration on November 30, 2008, so that requirement no longer existed. Finally the lease did not need to be cancelled because it ended on November 30, 2008, when QPC became a month to month tenant (*see RPL Section 232-c*).

Further, this court further finds that the landlord properly categorizes the aforesaid clause as a "demolition clause" which gives the landlord the option of cancelling the lease under the relevant contract law of this state. Reading the four corners of the lease agreement, this court finds that this is a proper interpretation of the clause.

Similarly, plaintiff has failed to establish irreparable harm or the balancing of the equities in its favor. The landlord has properly elected to terminate the month to month tenancy by the

requisite Thirty-Day Notice.

In accordance with the foregoing, it is ordered that plaintiffs request for a preliminary injunction is denied., in its entirety.

Dated : October 15, 2015

  
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THOMAS D. RAFFAELE, J.S.C

**FILED**  
**OCT 20 2015**  
**COUNTY CLERK**  
**QUEENS COUNTY**