

**117-119 Leasing Corp. v Reliable Wool Stock, LLC.**

2015 NY Slip Op 32837(U)

March 25, 2015

Supreme Court, New York County

Docket Number: 654310/2013

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SINGH  
Justice

PART 61

117-119 LEASING CORP

INDEX NO. 654310/13

- v -

RELIABLE WOOL STOCK, LLC

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*decided in accordance with the  
annexed memorandum opinion.*

Dated: 3/25/15

ae  
HON. ANIL C. SINGH J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----X  
117-119 LEASING CORP.,

Plaintiff,

-against-

RELIABLE WOOL STOCK, LLC.

Defendant.  
-----X

DECISION AND  
ORDER

Index No.654310/2013  
Mot. Seq. 001

HON. ANIL C. SINGH, J.

In this landlord-tenant dispute, plaintiff 117-119 Leasing Corp. (“Leasing Corp.”) moves by Order to Show Cause, for an Injunction pursuant to First Nat. Stores, Inc. v Yellowstone Shopping Ctr., Inc., 21 NY2d 630 [1968] enjoining defendant-landlord Reliable Wool Stock, LLC, (“Reliable Wool) from terminating its commercial lease while this action is pending, and tolling plaintiff-tenant’s time to cure any defaults of the lease for the property located at 117-119 Mercer Street New York, NY (the “Premises”). Defendant-Landlord Reliable Wool opposes and cross moves for an order directing plaintiff’s to make the subject Premises available for an immediate inspection. The cross motion was subsequently rendered moot by this Court’s decision dated June 11, 2014.

### *Facts*

This action involves the alleged breach of a lease agreement dated August 18, 1993 between Defendant Reliable Wool Stock's predecessor in interest<sup>1</sup> as the landlord, and plaintiff 117-119 Leasing Corp., as the tenant, for a period to commence on January 1, 1994. Pursuant to the First Amendment of Lease dated January 29, 1997, the subject lease was subsequently amended and extended to have an expiration date of January 31, 2036 (collectively the "Lease").

Defendant-Landlord Reliable Wool Stock served a Notice of Termination dated December 12, 2013 ("Notice") upon Plaintiff-Tenant Leasing Corp wherein Landlord outlined a number of alleged breaches of the Lease that landlord characterized as non-curable. As such, in its Notice, Defendant-Landlord elected to terminate the lease on December 18, 2013. Plaintiff-Tenant commenced this action on December 16, 2013 seeking declaratory relief contending that the Notice is defective and legally insufficient.

### *Law*

A Yellowstone injunction is equitable relief which "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

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<sup>1</sup> Reliable Wool Stock Corp., is defendant Reliable Wool Stock, LLC's predecessor in interest.

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 Ave. Assoc., 93 NY2d 508, 514 [1999]).

Although routinely granted, in order to obtain a Yellowstone Injunction a tenant must demonstrate: “(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.” (225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp., 211 AD2d 420, 421 [1st Dept 1995]).

### *Analysis*

#### *Notice to Cure vs. Notice of Termination*

As a threshold matter, defendant argues a Yellowstone Injunction is precluded since they served a Notice of Termination rather than a Notice to Cure onto plaintiff thus there is no cure period for plaintiff to possess the ability to cure. Defendant’s characterization of the defects as non-curable is not controlling upon this Court (see discussion infra). Yellowstone relief is available even in circumstances where the termination notice contains no cure period (RKO Century Warner Theatres, Inc. v. Morris Indus. Builders, 1997 WL 34846723) (J. Saxe

granting a Yellowstone Injunction where the tenant has received a purported notice of termination, but the lease has not yet terminated. A Yellowstone Injunction may be granted when tenant “has received from the landlord a notice of default, a notice to cure or a threat of termination of the lease”); (Zona, Inc. v Soho Centrale LLC, 270 AD2d 12 [1st Dept 2000]) (finding a threat of termination of the lease is sufficient).

In light of the preceding, plaintiff’s contention that a notice to cure for a 30 day cure period was required as an express condition precedent under ¶19 of the Lease is moot since the notice of termination operated as the notice to cure and this Court entered a temporary restraining order dated December 17, 2013.

Additionally, plaintiff’s contention that the Notice is defective on its face has been considered and found unavailing.

#### *Timely Application*

Since, here, the landlord did not provide the tenant with an explicit opportunity to cure, the time period between when the Notice was served and the date which the landlord elected to terminate the lease operated as the cure period (see Empire State Bldg. Assoc. v Trump Empire State Partners, 245 AD2d 225, 228 [1st Dept 1997]).

Defendant-Landlord Reliable Wool Stock served the Notice of Termination upon Plaintiff-Tenant Leasing Corp on December 12, 2013 therein electing to

terminate the lease on December 18, 2013. Plaintiff-Tenant timely commenced this action on December 16, 2013 before the termination date. Thus Plaintiff's application for a Yellowstone Injunction was timely submitted (Barsyl Supermarkets, Inc. v Ave. P. Assoc., LLC, 86 AD3d 545 [2d Dept 2011]) (holding that a notice of commercial lease termination indicating intent to terminate lease constituted a notice to cure and thus tenant's motion for a Yellowstone injunction, filed within time period before lease termination, was timely).

### *Defaults*

Defendant-Landlord Reliable Wool Stock contends Plaintiff-Tenant Leasing Corp breached the lease justifying its termination pursuant to ¶¶ 9 and/ or 13 of the Lease. Specifically, defendant argues plaintiff breached the lease when it, *inter alia*: 1) allowed the unlawful commercial/business use of residential space, 2) allowed the unlawful retail use of wholesale space, 5) repeatedly made alterations to the Premises without the defendant-landlord's consent or necessary governmental permits, 3) allowed a business to operate from the Premises without a license, 4) engaged in a pattern of falsely-representing plaintiff to be the owner of the Premises or an authorized representative of defendant in official governmental filings, and 6) failed to comply with clear provisions of the Lease Agreement including insurance requirements.

If the default specified in the Notice is not is not susceptible to cure, then the Yellowstone application will be denied. (Zona, Inc. v Soho Centrale LLC, 270 AD2d 12 [1st Dept 2000]). The tenant must evince a desire and ability to cure the default in order to maintain its Yellowstone application. (Id.).

Upon the affidavits of Richard Robinson, plaintiff's position is that it is ready, willing and able to cure any unlawful alterations to the Premises, commercial use of residential space, commercial use of residential space, and retail use of wholesale space. As such, these are curable defects under the Yellowstone application.

With respect to sub-tenant-defendant Soho Sanctuary, Defendant-Landlord Reliable Wool Stock argues that the Lease was breached when plaintiff allowed Soho Sanctuary to operate a business from the Premises without a license thus violating the applicable Certificate of Occupancy. Upon the affirmation and letter of Robert Bernstein, sub-tenant-defendant Soho Sanctuary applied and obtained a renewal of their Appearance Enhancement Business license thus this is a curable defect.

Defendant-Landlord Reliable Wool Stock also asserts the unavailing position that plaintiff's misrepresentations regarding ownership constitute a breach of the lease. While not ruling on its lawfulness, the Court does not find an

applicable section of the Lease that would be violated due to this course of conduct. Accordingly, Yellowstone relief is granted in regards to the defects previously analyzed (see Artcorp Inc. v Citirich Realty Corp., 124 AD3d 545, 546 [1st Dept 2015] (granting Yellowstone where plaintiff-tenant has to the willingness and ability to cure).

Lastly, the Notice indicates that plaintiff breached the Lease by not previously and continuously maintaining insurance coverage as required by the lease. The failure to maintain insurance coverage is an incurable violation that is an independent basis for the denial of Yellowstone relief (Kyung Sik Kim v Idylwood, N.Y., LLC, 66 AD3d 528, 529 [1st Dept 2009]). Plaintiff has proffered insurance certificates indicating coverage for the Premises.

However, defendant-landlord contends that plaintiff cannot retroactively obtain insurance and the terms of the proffered insurance policy fail to comply with the requirements of ¶13 the Lease. Defendant-landlord outlines numerous deficiencies of the insurance certificates including, *inter alia*,: (i) Defendant was not named as an insured as required by ¶ 13.2 of the Lease; (ii) it fails to contain waiver of subrogation language as required by ¶ 13.2 of the Lease; (iii) it does not contain language that property damage/losses are payable to defendant as required by ¶13.2 (c) and (d) of the Lease (iv) there is no provision that there is no co-insurance as required by ¶13.1 (a) of the Lease; (vi) the amount of insurance limits

is insufficient as required by ¶13.1 of the Lease; and (vi) there is no evidence of worker's compensation insurance as required by ¶13.1 of the Lease. Furthermore, defendant argues that plaintiff did not provide it with notice of any material change in coverage or cancellation to the policy in violation of ¶13.2 (e) of the Lease.

Plaintiff takes no position on defendants' claim that the insurance policy is inadequate. Whether the terms of the insurance policy comply with the requirements of the Lease is an issue of fact which will not be determined on this Yellowstone application.

The First Department has already held that deficiencies in insurance coverage constitute an incurable default that "does not protect the landlord against the unknown universe of any claims arising during the period of no insurance coverage." Kyung Sik Kim v Idylwood, N.Y., LLC, 66 AD3d 528, 529 [1st Dept 2009]). As such, Yellowstone relief which is intended to stay the cure period for tenant to have the opportunity to cure a defect would be inapplicable on this issue whereby tenant could not retroactively obtain insurance coverage in compliance with the lease provisions<sup>2</sup>. Thus, Yellowstone relief is denied on the default of

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<sup>2</sup> The Court's own research reveals two cases where Yellowstone Injunction were granted on insurance defaults. W & G Wines LLC v Golden Chariot Holdings LLC, 46 Misc 3d 1202(A) [Sup Ct 2014] and New York Classic Motors, LLC v. 250 Hudson Street, LLC, 2013 WL 5925541 (N.Y.Sup.), 2, are distinguishable. In W & G Wines, defendant-landlord had already acknowledged policy as sufficient in an email and in Classic Motors, defendant-landlord provided plaintiff-tenant with an explicit opportunity to cure the insurance defect in their notice.

insurance procurement (id.). (see also Excel Graphics Tech., Inc. v CFG/AGSCB 75 Ninth Ave., L.L.C., 1 AD3d 65, 71 [1st Dept 2003] (deciding on a Yellowstone motion and a cross motion to dismiss that there was no waiver of a lease prohibition thus finding Yellowstone injunction should have been denied).

#### *Preliminary Injunction and Waiver*

Alternatively, plaintiff-tenant seeks a preliminary injunction on grounds of waiver. On a motion for a preliminary injunction, the moving party must show “a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance-of equities tipping in favor of the moving party” (1234 Broadway LLC v W. Side SRO Law Project, 86 AD3d 18, 23 [1st Dept 2011]).

Plaintiff has argued that if a preliminary injunction is not granted to enjoin defendant-landlord from commencing a summary proceeding in Civil Court, then it will lose a valuable leasehold that according to the terms of the lease should not terminate until 2036.

Courts, in granting Yellowstone relief, require far less than is normally required for obtaining preliminary injunctive relief (225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp., 211 AD2d 420, 421 [1st Dept 1995]). While waiver may be raised as an affirmative defense for breach of the Lease, it is not a basis for granting a Preliminary Injunction as it raises a sharp disputed issue of fact


(Hartford v Resorts Intern., Inc., 43 AD2d 828, 828 [1st Dept 1974]). The standard for granting a preliminary injunction is higher than that of a Yellowstone Injunction (see 225 E. 36th St. Garage Corp. at 421). Courts are loath to grant a preliminary injunction when they have not granted a Yellowstone Injunction (B. Boman & Co., Inc. v Professional Data Mgt., Inc., 218 AD2d 637, 637-38 [1st Dept 1995]) (accordingly denying a preliminary injunction based on same reasoning). Here, we have declined to grant a Yellowstone Injunction based on the First Department's holding that an insurance defect is an incurable defect thus, we will likewise decline to grant the preliminary injunction.

Accordingly it is,

ORDERED that the Notice of Termination dated December 12, 2013 is tolled as to all events of default except for the alleged failure to comply with the insurance requirements set forth in §13 of the Lease; and it is further

ORDERED that defendant Landlord Reliable Wool Stock and its agents are enjoined from terminating the Lease and plaintiff's leasehold interest in the Premises, from taking any action including commencing any legal, equitable or summary proceeding to eject or evict plaintiff from the subject premises as to all events of default except the alleged failure to comply insurance requirements set forth in §13 of the Lease.

Date: March 25, 2015  
New York, New York

  
\_\_\_\_\_  
~~Anil C. Singh~~