

**Tap Tap, LLC v 558 Seventh Ave. Corp.**

2016 NY Slip Op 30352(U)

March 3, 2016

Supreme Court, New York County

Docket Number: 154951/2015

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: EDHEAD  
Justice

PART 35

TAP TAP, LLC  
558 SEVENTH AVE. CORP., ETAL.

INDEX NO. 154951/15  
MOTION DATE 3/2/16  
MOTION SEQ. NO. 03

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In this action for declaratory and *Yellowstone* injunctive relief, plaintiff Tap Tap, LLC (“plaintiff”) moves by order to show cause for an order clarifying, resettling, and/or modifying this Court’s November 19, 2015 Amended Decision and Order, in accordance with plaintiff’s attached proposed order. According to plaintiff, clarification of the November 19, 2015 (“Modification Order”) is required to make clear that the Court’s previous August 5, 2015 order dismissed this *Yellowstone* action without prejudice, without reaching the merits, and that said Modification Order operated only to dismiss with prejudice those issues specifically ruled upon by this Court in its other, previous June 30, 2015 Order (the “June 30th order”).<sup>1</sup>

Defendants 558 Seventh Ave. Corp. (“558”) and Jane Upton in her capacity of Trustee of two trusts (“Upton”) (collectively, “defendants”) oppose the application, and in the alternative, seek an order reinstating defendants’ previous cross-motion of July 23, 2015 and dismissing the action with prejudice on the merits. Defendants contend that there is no evidence that plaintiff cured the violations referred to in the April 3, 2015 15-Day Notice of Default (the “15-Day Default Notice”), notwithstanding the Court’s August 4, 2015 dismissal order which gave plaintiff an opportunity to reopen this matter upon a showing of cure, and the time to cure such

<sup>1</sup> Plaintiff asserts that clarification is necessitated by the decision and order by Civil Court Judge David B. Cohen, in which Judge Cohen dismissed a majority of plaintiff’s affirmative defenses in the Summary Proceeding based on *res judicata* of this Court’s November 19 Modification Order.

Dated: \_\_\_\_\_, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

default has long expired.

*Factual Background*

Defendants served plaintiff (its commercial tenant), the 15-Day Default Notice, alleging breaches of certain paragraphs the subject lease and resulting Department of Buildings violations against building. Under said Notice, plaintiff had until April 21, 2015 to cure the breaches. On April 22, 2015, after the time to cure expired, defendants served plaintiff a three-day “Notice of Cancellation” (the “3-day Termination Notice”), advising plaintiff that it “continue[d] to violate” the lease by failing “to remove the conditions which have led to ECB violations being filed against the Building” and terminating the lease effective April 25, 2015.<sup>2</sup> After plaintiff allegedly failed to vacate the premises, defendants commenced a summary holdover proceeding against plaintiff on May 13, 2015.

Thereafter, on May 18, 2015, plaintiff commenced this action seeking declarations that both the 15-Day Default Notice and 3-Day Termination Notice (the “Notices”) were nullities (first and second causes of action); a declaration that plaintiff is not in default of the lease because the alleged violations do not constitute a material breaches (third cause of action); a declaration that defendants’ issuance of the 3-Day Termination Notice was improper because plaintiff diligently and in good faith undertook to remove the violations (fourth cause of action); to permanently enjoin defendants from recovering the premises so long as plaintiff worked towards removing the violations and requiring defendants to cooperate with plaintiff’s efforts to remove the violations (fifth and sixth causes of action).

Approximately two weeks later, on June 2<sup>nd</sup>, plaintiff moved by order to show cause to stay and toll the 15-Day Default Notice, stay defendants from taking any action as to the 3-Day Termination Notice pending a determination as to whether said notice was properly issued, and to stay the holdover proceeding, and the Court issued an interim stay. However, by order dated June 8, 2015, the Court vacated the interim stay “because the issue of jurisdiction is undecided” and directed the parties to file further submissions on the threshold issue of the “‘purported’ notice.”

Upon full submissions, and as to the issue of “whether the ‘purported’ 15-day notice to cure and subsequent notice to terminate tenancy are valid,” the Court rejected plaintiffs’ claims that that the May 8<sup>th</sup> Letter overrode the notices and reinstated the lease and that the 15-day Default Notice was facially deficient and improperly served. The Court held that “plaintiff’s objections to the notices on the ground that the notices are invalid and fatally defective, lack

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<sup>2</sup> Defendants then wrote a letter dated May 8, 2015 wherein defendants “affirm[ed] that Eugene Giscombe is a principal of Tap Tap LLC, the lessee . . . and is authorized to file certifications related to the removal of ECB violations.” The “authorization is being given without prejudice to the owner’s petition based on breach of lease, and tenant’s failure to timely comply with the notice of default.” (the “May 8<sup>th</sup> Letter”).

merit” and ordered the parties to appear “for a conference to discuss the issue of ‘ability to cure’” on August 4<sup>th</sup>. (the “June 30<sup>th</sup> Order”).

Days before the conference, defendants cross moved to dismiss the complaint and opposed *Yellowstone* relief in light of Court’s finding that the notices were sufficient and properly served, and upon the grounds that plaintiff failed to timely move for such relief and was unable to cure the defaults. According to defendants, the Court’s finding negated the first and second causes of action pertaining to both notices, and the injunctions sought in the last two causes of action were unwarranted due to plaintiff’s failure to show ability to cure and that it timely sought such relief. And, the third and fourth causes of action for declarations that plaintiff was not in breach of the lease and took good faith efforts to cure were belied by the record showing plaintiff’s continued failure to remove the violations.

At the August 4, 2015 conference, the Court issued an order holding that:

“ . . . the action is dismissed without prejudice. The dismissal shall be lifted and the case reopened upon presentation by plaintiff herein of documentary evidence establishing “cure” of outstanding DOB violations and compliance with lease provisions, *e.g.*, permits and approved plans from the DOB.”

Notably, the Court’s August 4<sup>th</sup> order also stated that the “cross-motion was withdrawn.”

Thereafter, defendants moved to resettle and/or modify the August 4<sup>th</sup> order to reflect the dismissal of the action as “with prejudice.”

By order dated November 19, 2015, the Court granted the motion and “amended” the August 4<sup>th</sup> order as follows:

. . . the action is dismissed with prejudice, and the Court’s dismissal is limited to the rulings made in the Court’s interim order dated June 30, 2015 . . . .

Based on the above procedural history, and three orders, *as of* the November 19, 2015 order, which amended the August 4<sup>th</sup> order to a certain limited extent, the action was dismissed *with prejudice* based on the limited rulings made by the Court in its *interim* order dated June 30, 2015. In the June 30, 2015 order, the Court addressed two issues and ruled on such issues that, contrary to plaintiff’s contentions, (1) the May 8<sup>th</sup> Letter did not invalidate the notices or reinstate the lease and that the notices were adequate on their face and valid, and (2) the 15-Day Notice to Cure properly informed plaintiff of the consequences of failing to cure in accordance with paragraph 37 of the lease and accurately described the remedy necessary to cure the violations. Thus, plaintiff’s claims that both notices were invalid and fatally defective lacked merit. While

the action was dismissed with prejudice based on plaintiff's failure to establish that the notices were insufficient or invalid, the Court's dismissal was also tied to plaintiff's inability to show its ability to cure the DOB violations and comply with lease.

Inasmuch as defendants' cross-motion argued that plaintiff's continued failure to remove the violations negated the third and fourth causes of action seeking declarations that plaintiff was not in breach of the lease and took good faith efforts to cure, the Court's dismissals were not based on the merits of such arguments.

Therefore, based on the foregoing, it is hereby

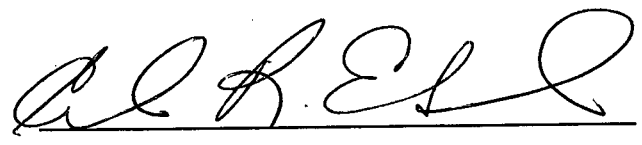
ORDERED that plaintiff's order to show cause for an order clarifying, resettling, and/or modifying this Court's November 19, 2015 Amended Decision and Order is granted to the extent that the action is dismissed *with prejudice* solely on the ground that plaintiff failed to establish that the 15-Day Default Notice and 3-Day Termination Notice were facially insufficient or invalid. The dismissal shall be lifted and the case reopened upon presentation by plaintiff herein of documentary evidence establishing "cure" of outstanding DOB violations and compliance with lease provisions, e.g., permits and approved plans from the DOB. And it is further

ORDERED that defendants' application for an order reinstating their previous cross-motion of July 23, 2015 and dismissing the action with prejudice on the merits, is denied. And it is further

ORDERED that plaintiff shall serve a copy of this order by overnight mail, federal express, to received by 10:00 a.m. March 7, 2016.

This constitutes the decision and order of the Court.

DATED: 3. 3. 2016



HON. CAROL R. EDMED J.S.C.  
J.S.C.

1. CHECK ONE :

2. CHECK AS APPROPRIATE :

3. CHECK IF APPROPRIATE :

DO NOT POST

CASE DISPOSED  
MOTION IS:  GRANTED  DENIED  
 SETTLE ORDER

FIDUCIARY APPOINTMENT

NON-FINAL DISPOSITION  
 GRANTED IN PART  OTHER  
 SUBMIT ORDER

REFERENCE