

Steve Madden Retail, Inc. v 720 Lex Acquisition LLC
2016 NY Slip Op 31522(U)
August 5, 2016
Supreme Court, New York County
Docket Number: 158822/15
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 8

-----X
STEVE MADDEN RETAIL, INC.,

Plaintiff,

Index #158822/15

-against-

Decision & Order

720 LEX ACQUISITION LLC,

Defendant.

-----X
KENNEY, JOAN, M., J.S.C.

For Plaintiff:
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For Defendants:
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Papers considered in review of this motion seeking a Yellowstone injunction:

Papers	Numbered
Order to Show Cause, Affirmation, Affidavits, Exhibits and Memorandum of Law	1-10
Notice of Cross Motion, Affirmation, Affidavit, Exhibits and Memorandum of Law	11-20
Notice of Motion, Affirmation, Affidavits in Support, and Exhibits	21-35
Affirmation, Affidavit in Opposition	36-49
Reply Affirmation and Exhibit	50-51

Motion sequences 001-003¹ are consolidated for decision.

Plaintiff, Steve Madden Retail Inc. (the tenant) moves, by Order To Show Cause (OSC), for a Yellowstone injunction seeking to toll the period to cure plaintiff's alleged violations of the commercial lease (the lease), attendant to the ground floor, second floor, third floor and fourth floor located at 720 Lexington Avenue, New York, New York (the premises). Defendant, 720 Lex Acquisition LLC (the landlord), cross moves for an Order directing plaintiff to

¹Defendant cross moved and the cross motion is deemed Motion sequence 002.

pay, *pendente lite*, rent and additional rent, payments and/or use and occupation (the rent) for the accrued arrears and going forward during the course of this litigation.²

Factual Background

The lease for the premises, is for a term of 10 years, which commenced on or about January 3 2007. The lease was amended on or about February 1, 2007, and again, in August 2007. The annual rent for the premises, is currently \$1,539,920.64. In addition, the tenant is liable for 100% of the real estate taxes "appurtenant to the building to the extent the same exceed those payable in the fiscal tax year July 1, 2007 through June 30, 2008."

On or about September 2, 2015, the landlord served a 5 day Notice to Cure, relative to the tenant's alleged failure to pay the a portion of the rent due and owing under the lease. The 5 day notice stated that in the event the tenant did not pay the rent arrears within the cure period, the tenant would be deemed in default under the terms of the lease, and thereafter, the lease would be deemed terminated. The parties do not dispute that the lease provides that the landlord can, and may, terminate the lease if the rent and additional rent are not paid timely, during the lease term.

² In motion sequence 003, defendant seeks an Order permitting the landlord to enter the premises to correct a New York City Buildings Department violation and vacatur of the TRO signed as part of the instant application.

The tenant asserts that it has been "partially constructively evicted from the premises." Plaintiff alleges, inter alia, that there are hazardous conditions in the basement of the premises, that include, among other things, a mold condition that has resulted from water infiltration, structural cracks to the foundation and walls of the premises. According to plaintiff, such conditions endanger the health general public who enter the premises and thus, "pose a substantial danger of spoilage and deterioration to Tenant's valuable inventory located in the premises."

Consequently, according to plaintiff, it is relieved from paying the amounts allegedly due and owing to the landlord and is entitled to a rent abatement. Notwithstanding, plaintiff's claim that the amount allegedly due is incorrect, plaintiff states that it is "ready, willing able to cure, if necessary."

The landlord states that the tenant's claims of constructive eviction are completely baseless. Moreover, that Article 14 of the lease sets forth a very specific process the tenant was contractually obligated to utilize, in the event any condition existed that the landlord was responsible for repairing. Section 14.1 states in pertinent part as follows:

Tenant shall give to Landlord prompt notice of any damage to, or defective condition in, any part of the Structural Elements (a term defined in the lease), and the damage or defective condition shall be remedied

by Landlord with reasonable diligence; provided, however, that if such damage or defective condition (other than any such damage with respect to which tenant is relieved from liability pursuant to SECTION 12.2) was caused by, or is attributable to, Tenant Changes or unreasonable or improper use of such system"

It is undisputed that the tenant made an attempt to take advantage of the notice provisions recited herein, but in fact sent the notice to the wrong address.

Discussion

First Nat. Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 21 NY2d 630 (1968), and its progeny established a four prong test for determining whether a "Yellowstone" injunction should be granted. The requirements for obtaining Yellowstone relief are as follows: (1) plaintiff holds a commercial lease, (2) the landlord has served a notice to cure, (3) the referenced cure period has not expired, and (4) plaintiff has to demonstrate an ability and willingness to "cure." *ERS Enterprises, Inc. v Empire Holdings, LLC*, 286 AD2d 206 (1st Dept 2001); *Purdue Pharma LP v Ardsley Partners, LP*, 5 AD3d 654 (2nd Dept 2004); (*Aegis Holding Lipstick LLC, v Metropolitan 885 Third Avenue Leasehold LLC, and CB Richard Ellis, Inc.*, 95 AD3d 708 [1st Dept 2012]).

A Yellowstone injunction 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 cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture of the lease (*Post v 120 E. End Av. Corp.*, 62 NY 2d 19, 26 [1988]). Additionally, the very nature of this kind of injunction is designed to "forestall the cancellation of a lease to afford the tenant an opportunity to obtain a judicial determination of its breach, the measures necessary to cure it, and those required to bring the tenant in future compliance with the terms of the lease (see, *Waldbaum, Inc. v. Fifth Ave. of Long Is. Realty Assocs.*, 85 NY2d 600, 606 [1995]).

Furthermore, "[t]he purpose of a notice to cure is to specifically apprise the tenant of claimed defaults in its obligations under the lease and of the forfeiture and termination of the lease if the claimed default is not cured within a set period of time." *542 Holding Corp. v Prince Fashions, Inc.*, 46 AD3d 309 (1st Dept 2007).

Finally, to obtain Yellowstone relief a tenant need not show a likelihood of success on the merits (*WPA/Partners LLC v. Port Imperial Ferry Corp.*, 307 AD2d 234, 237 [1st Dept 2003]). It can simply deny the alleged breach of its lease (see *Boi To Go, Inc. v. Second 800 No. 2 LLC*, 58 AD3d 482 [1st Dept 2009]). *Artcorp Inc. v Citirich Realty Corp.*, 124 AD3d 545, 546 (1st Dept 2015).

In light of the foregoing, tenant has set forth a prima facie case for a Yellowstone injunction, and therefore, plaintiff's

motion is granted.

A court has broad discretion in awarding use and occupancy *pendente lite* (see *Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124, [1st Dept. 2000]). Because discovery must be concluded to determine the credibility of the tenant's allegations of constructive eviction, the landlord is awarded temporary rent/use and occupancy *pendente lite*, without prejudice, in the amount recited in the lease for rent and additional rent, for the year 2016.

Although the court may look to the amount of rent paid under a prior lease between the parties in setting use and occupancy (see *Kuo Po Trading Co. v Tsung Tsin Assn.*, 273 AD2d 111 [1st Dept 2000]), prior rent is only probative, not dispositive, on the issue (see *Mushlam, Inc. v. Nazor*, 80 AD 3d 471, 472 [1st Dept 2011]; *43rd St. Deli, Inc. v Paramount Leasehold, L.P.*, 107 AD3d 501 [1st Dept 2013]).

Nevertheless, to the extent that plaintiff is ultimately successful at trial, it may be provided with a refund or rent credit (see *Morris Hgts. Health Ctr., Inc. v. DellaPietra*, 38 AD3d 261 [1st Dept 2007]; *43rd St. Deli, Inc. v Paramount Leasehold, L.P.*, 107 AD3d 501 [1st Dept 2013]). Moreover, a landlord may be entitled to an award of use and occupancy based upon that fair market rental value of the leased premises (see Real Property Law §220; *Northern Westchester Professional Park Assoc. v Town of*

Bedford, 60 NY2d at 499 [1983]. Split Rock Developers, LLC, v Zartab, Inc.; 135 AD3d 845 [2nd Dept 2016]). Consequently, the landlord's cross-motion is also granted, in part.

Accordingly, it is

ORDERED that plaintiff's motion is granted; and it is further

ORDERED that defendant's motion is denied in part and granted in part without prejudice; and it is further

ORDERED that plaintiff is directed to pay past rent/use and occupancy in the amount of \$1,155,000.00, without prejudice, within 45 days of notice of entry hereof, and it is further

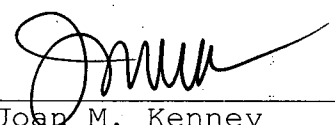
ORDERED that at the time of trial, in the event plaintiff is the prevailing party, plaintiff is entitled to a credit that shall be calculated at that time by the trial court; and it is further

ORDERED that plaintiff grant access forthwith to the leased premises so defendant may make whatever repairs are necessary to cure any New York City Department of Buildings violations that have been issued or adjudicated; and it is further

ORDERED that the parties appear in Part 8, Room 304 at 71 Thomas Street, New York NY, for a preliminary conference on September 29, 2016 at 9:30 AM

Dated: August 5, 2016

E N T E R:



Hon. Joan M. Kenney

JOAN M. KENNEY
J.S.C.