

Pureform Movement, LLC v 2374 Concourse Assoc., LLC
2016 NY Slip Op 32262(U)
November 4, 2016
Supreme Court, New York County
Docket Number: 150758/15
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 8

-----X
PUREFORM MOVEMENT, LLC,

Plaintiff,

Index # 150758/15

-against-

Decision & Order

2374 CONCOURSE ASSOCIATES, LLC and
101 E. BURNSIDE PARTNERS LLC,

Defendants.
-----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	1-19
Affirmation in Opposition, Exhibits and Memo of Law	20-26

Plaintiff, Pureform Movement LLC (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 and basement located at 84 Franklin Street, New York, New York (the premises). Defendants, 2374 Concourse Associates, LLC and 101 E. Burnside Partners LLC (the landlord)¹, opposes the application.

Factual Background

The lease for the premises, is for a term of three years, which commenced on or about October 25, 2011 and expired by its own terms

¹The lease was originally held by Brosrub Company LLC, the predecessor in interest with the defendants herein.

on or about September 25, 2014. Notably, the tenant has the sole right to renew the lease in accordance with two options. Option 1 refers to the renewal of the lease for years four through six and Option 2 refers to years seven through nine.

On or about, January 16, 2015, the landlord served a notice to cure (the notice) that demanded the tenant correct certain alleged defaults relative to paragraphs 3, 6, 14 and 15 of the lease, as well as, paragraphs 11, 19, and 21 of the rider to the lease. This fifteen day notice further states, that plaintiff built and was operating an unlicensed, uninsured gymnasium in violation of the New York City Administrative, Building and Fire codes; resulting in, *inter alia*, a violation of the building's certificate of occupancy.

Plaintiff denies the allegations recited in the notice and asserts that the landlord was acutely aware of the efforts being made by plaintiff to "obtain the necessary approvals and permits to operate a physical culture establishment well before the [notice to cure] was served." Plaintiff has also provided proof of insurance as attached to the motion papers as Exhibit C. Significantly, the lease itself identifies the use of the premises to be that of a "Fitness Center and for no other purpose."

It is undisputed that on or about December 7, 2014, the New York City Department of Buildings issued a violation to the landlord. The violation alleged that their was a "physical culture establishment (gym)" operating without the necessary permits and approvals. This violation resulted in a \$1,200.00 fine being

assessed against the landlord.

Arguments

Plaintiff argues that the landlord has intentionally refused to expeditiously cooperate in the process of obtaining the necessary permits to operate a gym from the City of New York. (See, affidavit of plaintiff's architect in support of the motion). Plaintiff also contends that the current landlord took advantage of the fact that the principal of the prior owner died, and could not continue the process of bringing the gym into compliance with the City's codes.² Finally, plaintiff argues that it's business would be destroyed if it were forced to move from the premises.

The landlord claims that the legal use of the premises, (a gym), was predicated upon plaintiff's possession of all the necessary approved permits and plans to operate a gym. Moreover, plaintiff has been operating illegally for a number of years.

Discussion

"The 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). *First Nat. Stores, Inc. v Yellowstone Shopping Ctr., Inc.*, 21 NY2d 630 (1968),

²It is uncontested that the current landlord bought the building "subject to" the lease in effect at the time of the closing.

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).

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]; *542 Holding Corp. v Prince Fashions, Inc.*, 46 AD3d 309 [1st Dept 2007]).

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]).

Yellowstone relief is available to protect against leasehold forfeiture, provided that the tenant has the ability to cure by means short of vacatur in the event the tenant is found to be in default of its obligations under a lease (*Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 25 [1984]). This rationale is in line with this State's public policy against the forfeiture of leases (see *Sharp v Norwood*, 223 AD2d 6, 11 [1996], *affd.* 13 89 NY2d 1068 [1997]). This disinclination against leasehold forfeitures serves to promote the economy and business in our City.

This public policy concern takes on greater weight when a tenant has asserted that it will diligently and in good faith attempt to cure the defect, but through no inaction of its own, can not do so without the cooperation of defendant (see *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 695 [1995] [equity may intervene to relieve (...) against ... forfeitures of valuable lease terms when default in notice has not prejudiced the landlord], quoting *Jones v Gianferante*, 305 NY 135, 138 [1953]; *J.N.A. Realty Corp. v Cross Bay Chelsea*, 42 NY2d 392, 397 [1977]; *Weissman v Adler*, 187 AD2d 647, 648 [1st Dept 1992]).

The Court of Appeals has acknowledged that Courts routinely

grant Yellowstone relief to reflect this State's previously described policy against forfeiture, and the Courts have done so by accepting "far less than the normal showing required for preliminary injunctive relief" (*Post*, 62 NY2d at 25).

A Yellowstone injunction to stay proceedings in response to landlord's notice to cure is a provisional remedy, and the purpose of interlocutory relief is not to determine the ultimate rights of the parties but to maintain the status quo until a full hearing on the merits can be held. (see *Gambar Enters. v Kelly Servs.*, 69 AD2d 297, 306 [4th Dept 1979]; *2914 Third Sportswear Realty Corp. v. Acadia 2914 Third Ave., LLC*, 93 AD3d 573, 573 [1st Dept 2012]; *Vill. Ctr. for Care v Sligo Realty & Serv. Corp.*, 95 AD3d 219, 222 [1st Dept 2012]).

Plaintiff has shown that it is prepared and it has the ability to assist in curing the alleged defaults (*Aegis Holding Lipstick LLC, v Metropolitan 885 Third Avenue Leasehold LLC, and CB Richard Ellis, Inc.*, 95 AD3d 708 [1st Dept 2012]). Consequently, and for the reasons set forth herein, the motion is granted. Accordingly it is,

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

Ordered that if plaintiff has not been paying rent and additional rent pursuant to the terms of the lease, plaintiff shall pay same in accordance with the terms of the lease, forthwith; and it is further

ORDERED that if plaintiff is in arrear in the payment of the

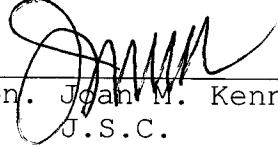
[* 7]

rent the parties shall devise a payment plan to pay the arrears with
in 12 months from the date hereof; and it is further

ORDERED that the parties appear for a preliminary conference on
DECEMBER 15, 2016 at 9:30AM, in Rm. 304 located at 71 Thomas
Street, New York, NY.

Dated: November 4, 2016

E N T E R:



Hon. Joan M. Kenney
J.S.C.