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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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AT THE BAR, LLC, 622 WEST 47TH LLC and OUR WAY NYC LLC,

Plaintiffs,

Index No. 653723/2016

- against -

622W47LLC and ANDREW IMPAGLIAZZO

Defendants.

ANDREW IMPAGLIAZZO,

Third-Party Plaintiff,

- against -

ANTHONY BERRITTO and MARC BERNSTEIN,

Third-party Defendants.

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Hon. C. E. Ramos, J.S.C.:

In motion sequence 003, Defendants 622 W47 LLC ("Landlord") and Andrew Impagliazzo ("Impagliazzo") (collectively "Defendants") move for an order directing At The Bar, LLC ("ATB") 622 West 47TH LLC ("622"), and Our Way NYC LLC ("OW") (collectively "Plaintiffs") to pay rent and post an undertaking should the Yellowstone Injunction previously granted on September 26, 2016 be kept in place.

For the reasons set forth below, the Court denies Defendants' motion directing Plaintiffs to pay rent but requires that Plaintiffs post an undertaking in the amount of $40,000.

Background

Plaintiffs are New York limited liability companies and affiliates created for the purpose of operating a cabaret and gentlemen's club at 622 West 47th Street ("Subject Premises"). Landlord is a domestic limited liability company located in New York. Impagliazzo is a resident of the State of New York.

OW entered into the primary lease, dated January 2013, with Landlord to rent the Subject Premises for a twenty (20) year term, with an option to renew for an additional ten (10) years. Shortly thereafter, the members of OW formed 622 and entered into subsequent leases with the landlord for the Subject Premises (collectively the "2013 Leases"). At Impagliazzo's direction and in accordance with Section 6.3.1 of the 2013 Leases, OW deposited $150,000 in escrow prior to the commencement of tenant's work of building out the Subject Premises. Subsequently, OW commenced work on the cellar of the Subject Premises. I.M.P. Plumbing & Heating Corp. ("IMP"), which is solely owned by Impagliazzo, performed significant plumbing work on the Subject Premises. According to the complaint, Impagliazzo was present during OW's construction and did not object to any portion of the work.

In January 2015, ATB entered into yet another lease with Defendants("ATB Lease"). The terms and conditions of the ATB Lease as well as the 2013 Leases are substantially identical (collectively the "Leases").

Section 2.5 of the Leases provides, in relevant part, as follows:

> The obligation of Tenant to pay Rent hereunder shall commence upon the Rent Commencement Date. The Rent Commencement Date shall be the earlier of (i) the date when Tenant opens for business or (ii) 90 days following the "Possession Date".

Section 6.1 of the Leases indicates that the Possession Date is when the Landlord provides written notice of the substantial completion of Landlord's work ("Landlord's Work")("Substantial Completion Notice"). Exhibit 6.1, which is annexed to the Lease, provides, in part, that Landlord's Work shall mean the following:

> 1. Replace floors 2,3,4 and 5. This will include replacing the beams going across and installing plywood on top
> 2. Provide waste, water, and a vent on each floor to a tie-in location
> 3. Provide electrical panel on each floor
> 4. Replace the roof
> 5. Sprinkler riser- provide a tie-in location at each floor Outlet valve. Landlord will install sprinklers

Once Landlord's Work is completed and in accordance with building specifications and regulations, Landlord is to provide a Substantial Completion Notice, thereby putting tenants in possession and obligating them to pay rent. As of the date of the submission of this motion, Landlord has not provided the Substantial Completion Notice.

In addition, Plaintiffs allege to have spent approximately $4,000,000 in performing tenants' work and improving the Subject Premises, including, but not limited to, $200,000 on the HVAC

system, over $500,000 on flooring, over $450,000 on audio visual equipment, and over $100,000 on glass work. Part of the abovementioned work was funded by an $1,200,000 investment that Impagliazzo made in ATB.

In December 2013, Defendants demolished the top three stories of the Subject Premises. The south, west, and east walls were leveled down, but the north wall was left intact. In the summer of 2014, Defendants began to reconstruct the top three floors of the Subject Premises. Prior to construction, Defendants submitted permit applications to the Department of Buildings ("DOB") dated October 8, 2013, April 23, 2014, and October 9, 2014.

Plaintiffs tendered two $25,000 payments to Landlord. Plaintiffs subsequently tendered a check to Landlord in June of 2015 for $40,000, which purportedly did not clear. Plaintiffs also made at least three additional payments to Landlord: (i) Check #1019, dated December 11, 2014, for $56,230.91; (ii) Check #1054, dated February 17, 2015, for $75,000; and (iii) Check #1063, dated February 25, 2015, for $102,000.

On May 22, 2015, Plaintiffs, except ATB, provided an estoppel certificate, purportedly to allow Defendants to secure a loan ("Estoppel Certificate"). The Estoppel Certificate provides, among other things:

> (c) As of the date of Tenant's execution hereof, Tenant is occupying and paying rent on a current basis for the

following portions of the Property pursuant to the Lease: all of the Property.
(d) Tenant has accepted possession of the Leased Premises, and all items to be performed by Landlord have been completed.
(g) No default on the part of Landlord exists under the Lease in the performance of the terms, covenants, conditions of the Lease required to be performed on the part of Landlord.
(n) Tenant has no defense as to its obligations under the Lease and asserts no setoff, claim or counterclaim against Landlord under or with respect to the Lease.

On June 16, 2015, Landlord was issued DOB Permit Number: 122229178-01-EW-SP (the "6/16/15 Permit"). The 6/16/15 permit was renewed commencing on June 16, 2016.

On April 19, 2016, Defendants served ATB with a notice for rent ("Rent Demand") purportedly due, demanding fourteen (14) months of unpaid rent and three (3) unpaid real estate tax payments (*See* Exhibit E to Impagliazzo Affidavit). The Rent Demand was served simultaneously with a notice to cure ("Notice to Cure")(*See* Exhibit E to Beritto Affidavit). In response to the Notice to Cure, all Plaintiffs have brought a motion seeking a *Yellowstone* injunction. Defendants subsequently withdrew the Notice to Cure, but filed a separate Notice to Cure on August 9, 2016. Plaintiffs filed a new motion for a *Yellowstone* injunction, which this Court granted (*See* NYSCEF Doc. No. 104). After the Court granted Plaintiff's *Yellowstone* injunction, Defendants filed the instant motion seeking rent.

DISCUSSION

1. **Defendants' entitlement to rent payments**

As per Section 6.1 of the Leases, the prevailing issue is whether Plaintiffs are deemed to have "accepted possession" of the Leased Premises, thereby triggering the obligation to pay rent. Defendants argue that Plaintiffs' initial payments of $25,000 constituted rent and therefore confirm Plaintiffs' obligation to pay. According to Defendants, if Plaintiffs contested that rent money was due, they should not have made those initial payments.

In contrast, Plaintiffs argue that, because of the informal relationship between the parties, Plaintiffs made voluntary payments to Defendants when it appeared they were having financial difficulties. To Plaintiffs, these good faith payments do not constitute rent, as they were never invoiced for rent. Further, the payments were all in different amounts; none of them were for $40,000.00, the initial rent due under the Leases.

Aside from the April 19, 2016 Notice to Cure, Defendants have yet to provide Plaintiffs with a single invoice documenting the rent monies owed. Defendants do not explain why they never sought to collect rent prior to April 2016 if it was due and owing.

Plaintiffs assert that Defendants are not entitled to rent money because the Leases create a condition precedent to the

obligation to pay rent, as the Landlord's work must be substantially complete (*See Mount Sinai Hospital v 1998 Alexander Karten Annuity Trust*, 110 AD3d 288 [1st Dept 2013]). According to the terms of the Leases, Defendants are not entitled to rent money until Landlord's Work is "substantially complete." To Plaintiffs, since Defendants have not yet remedied the three floor demolitions, the construction cannot be considered substantially complete. Further, Plaintiffs maintain that the work that has been completed at the Subject Premises, such as the plumbing, was negligently performed, thereby requiring additional repairs to receive DOB certification.

Defendants are unable to demonstrate that Landlord's Work is substantially complete, as they fail to present evidence disputing Plaintiffs' assertion that the demolition has not yet been adequately restored.

Further, the Court rejects Defendant's contention that the Estoppel Certificate satisfies the Substantial Completion Notice requirement because it was not executed by ATB, Landlord's construction is not yet complete and the Estoppel Certificate appears to be submitted simply to facilitate the procurement of a loan made by First Bank and Trust of Illinois ("First Bank Loan") and not to satisfy the Substantial Completion Notice requirement (*See* Exhibit N to Impagliazzo Affidavit).

Defendants argue that, as explicitly stated in the Estoppel

Certificate, the Landlord's construction was complete, Plaintiffs accepted possession of the Subject Premises, and are therefore obligated to make rent payments. According to Plaintiffs, the Estoppel Certificate cannot satisfy the Substantial Completion Notice requirement because it contains many factual misrepresentations and ATB was not privy to the document. The Court finds Defendants' arguments unpersuasive.

Plaintiffs should not be penalized for their willingness to cooperate with Defendants and to assist them in securing the First Bank Loan. Regardless, the Court finds that the Estoppel Certificate will likely be deemed ineffective because ATB was not privy to such agreement.

This Court determines that the condition precedent to paying rent has not yet occurred, as the Landlord has not established that the Landlord's Work is substantially complete and has not complied with the Substantial Completion Notice requirement.

Plaintiffs also argue in the alternative, that even if the Landlord fulfilled the notice requirement, Defendants are not entitled to rent because their conduct amounts to a constructive eviction. Constructive eviction occurs when there is a "wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises" (*7001 East 71st Street, LLC v Millennium Health Services*, 138 AD3d 573, 573 [1st Dept 2016]). In order to recover under a constructive

eviction theory, the tenant must actually abandon the premises (*West Broadway Glass Company v I.T.M. Bar Inc.*, 245 AD2d 232 [1st Dept 1997]).

Here, Plaintiffs argue that the Landlord's structural alterations to the Subject Premises combined with the Landlord's failure to obtain proper permits rendered the Subject Premises unfit for Plaintiff's intended use, which was memorialized in the Leases. Defendants do not address this issue in their papers.

Nonetheless, this Court determines that the doctrine of constructive eviction is inapplicable to the current matter as the plaintiffs have not yet taken possession of the Subject Premises, and therefore cannot be said to have abandoned it.

In conclusion, since the Landlord has not provided Plaintiffs with written notice that Landlord's Work was substantially complete, nor has it been established that the work is, in fact, substantially complete, Plaintiffs cannot be said to be in possession of the Subject Premises and therefore rent is not currently due. As such, Defendants request for prospective rent should be denied.

2. **The validity of the Yellowstone injunction and the need for Plaintiffs to post an undertaking**

Defendants purport to challenge the validity of the *Yellowstone* injunction, but do not move to renew or reargue, nor do they demonstrate areas of fact or law that this Court

overlooked in granting it.

Finally, Plaintiffs argue that an undertaking is unnecessary because Defendants are adequately protected the $4,000,000 worth of improvements Plaintiffs made to the Subject Premises and cite to *Kuo Po Trading Co., Inc., v Tsung Tsin Assn.* (273 AD2d 111, 111 [1st Dept 2000]). However, in *Kuo Po Trading,* the Plaintiff was directed to continue paying rent at the same rate, and the court reasoned that on this basis, an undertaking was not necessary (*Id.* at 111). Here, in contrast, Plaintiffs are not paying rent and the value of the improvements alone may not adequately protect the Defendants.

One month's rent is considered an appropriate undertaking, as it is rationally related to the potential damages should an injunction be deemed unwarranted and therefore is not excessive (*See Medical Bldgs. Associates, Inc. v Abner Properties Co.*, 103 AD3D 488 [1st Dept 2013]).

Here, it is undisputed that Plaintiffs made $4,000,000.00 in improvements to the Subject Premises. Defendants assert that such improvements to the flooring, audio/visual equipment, the kitchen, and glass work do not serve to "increase the value of the property in any way" (Impagliazzo Affidavit at ¶ 27). However, Defendants failed to present evidence supporting this argument.

While the amount of improvements made by Plaintiffs do not

eliminate the need for an undertaking, they do serve to minimize the amount. Here, a $2,000,000 undertaking, demanded by Defendants, would clearly be excessive, given Plaintiffs' substantial improvements and the monthly rent of $40,000.00. As such, the Court finds that the appropriate amount of the Plaintiff's undertaking is $40,000.

Accordingly, it is

ORDERED that Defendants' motion is denied in part and granted to the limited extent that Plaintiff shall post an undertaking of $40,000; and it is further

ORDERED that Plaintiff shall post an undertaking of $40,000.00 within fourteen days from entry of this order granting a preliminary injunction; and it is further

DATED: December 9, 2016

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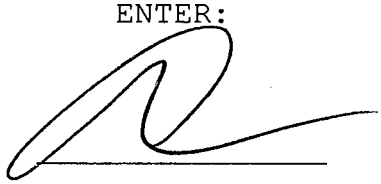

J.S.C.

CHARLES E. RAMOS