

**Worldwide Gifts, Inc. v 20 W. 33rd St. Prop. Owner,  
LLC**

2017 NY Slip Op 30214(U)

January 31, 2017

Supreme Court, New York County

Docket Number: 153045/2016

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK,  
COUNTY OF NEW YORK: PART 2

-----X  
WORLDWIDE GIFTS, INC.

Plaintiff,

**DECISION/ORDER**  
Index No. 153045/16  
Mot. Seq. No. 001

-against-

20 WEST 33<sup>rd</sup> STREET PROPERTY OWNER, LLC,

Defendant.  
-----X

**KATHRYN E. FREED, J.S.C.:**

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
ORDER TO SHOW CAUSE, AFFS. IN SUPP., & SUMM. AND COMPLT.	1-4 (Exs. A-L)
LEVY AFF. IN OPP.	5
CHISHOLM AFF. IN OPP.	6
REPLY AFF.	7 (Ex. A)

UPON THE FORGOING CITED PAPERS, THIS DECISION/ORDER OF THE MOTION IS AS FOLLOWS:

In this action seeking, inter alia, a declaration regarding its rights pursuant to a lease, plaintiff Worldwide Gifts, Inc., a commercial tenant at 20 West 33<sup>rd</sup> Street, New York, New York, moves, by order to show cause : 1) for a *Yellowstone* injunction tolling plaintiff's time to cure the alleged breach of its lease during the pendency of this action pursuant to *First National Stores, Inc. v Yellowstone Shopping Center, Inc.*, 21 NY2d 630 (1968); 2) enjoining defendant 20 West 33<sup>rd</sup> Street Property Owner, LLC, the owner of the premises, from taking any further action to terminate plaintiff's tenancy based on a notice to cure served on plaintiff by defendant dated April 4, 2016; and

3) for such other relief as may be just and proper. Defendant opposes the motion. After a review of the parties' papers<sup>1</sup> and the relevant statutes and case law, **the motion for a *Yellowstone* injunction is granted.**

#### **FACTUAL AND PROCEDURAL BACKGROUND:**

Pursuant to a lease dated December 4, 2000 ("the 2000 lease"), Empire T & G, Inc. ("Empire") predecessor-in-interest to plaintiff Worldwide Gifts, Inc., rented Store #2 at 20 West 33<sup>rd</sup> Street, New York, New York, then owned by Thirty Third Equities Company LLC ("TTE"), predecessor-in-interest to defendant 20 West 33<sup>rd</sup> Street Property Owner, LLC, for the purpose of operating a gift and souvenir shop. Ex. B.<sup>2</sup> Jong Ho Park, President of plaintiff, formed Empire for the purpose of operating the gift shop. Park Aff., at par. 4. The term of the 2000 lease was 10 years, expiring on October 30, 2010 and was for "store #2" at the premises. Ex. B.

Article 53 of the 2000 lease (Ex. B), entitled "Estoppel", stated in pertinent part:

Tenant shall, without charge, at any time and from time to time, within ten (10) days after request by Landlord, execute and deliver to Landlord a written declaration in recordable form . . . Such declaration shall be executed and delivered by Tenant from time to time as may be requested by Landlord at no cost or expense to it.

On January 31, 2001, TTE and Empire entered into an agreement amending the 2000 lease to provide Empire additional basement space in exchange for an additional \$150 rent per month. Ex.

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<sup>1</sup>By stipulation dated October 18, 2016, the parties waived oral argument of the motion. NYSCEF Doc. No. 22.

<sup>2</sup>Unless otherwise noted, all references are to the exhibits annexed to the affidavit of Jong Ho Park, President of plaintiff Worldwide Gifts, Inc.

C. On August 1, 2004, TTE and Empire entered into a second amended lease which extended the term of the 2000 lease from October 30, 2010 until October 30, 2018 and designated the base tax year for the calculation of real estate tax payments July 1, 2008 through June 30, 2009. Ex. D. On December 5, 2005, the 2000 lease was amended again, this time to award Empire a monthly credit of \$4,000 to be applied against the fixed minimum rent provided for in the 2000 lease and to change the base tax year to July 1, 2012 through June 30, 2013. Ex. E.

In October of 2008, Park formed a new corporation, Oasis Tee, Hat & Cap, Inc. ("Oasis"), to be tenant pursuant to the 2000 lease. Park Aff., at par. 9. TTE permitted Empire to assign the lease to Oasis. Ex. F. In January of 2011, Park again formed a new corporation, plaintiff Worldwide Gifts, Inc., and TTE permitted Oasis to assign the lease to plaintiff. Ex. G.

In 2013, plaintiff encountered a slump in sales due to a proliferation of other gift stores in the area, and wished to convert the premises into a liquor store. Park Aff., at pars. 11-12. To do so, however, plaintiff needed to form a new corporate entity and apply for a liquor license. Park Aff., at par. 13. Steven Levy, managing member of Kamber Management Company LLC ("Kamber"), managing agent of the building (Ex. L), advised plaintiff that it had TTE's permission to operate a liquor store in the building. Park Aff., at pars. 5, 12. Park then formed yet another corporation, Empire Wine and Liquor, Inc. ("Empire Wine") to operate a liquor store at the premises. Park Aff., at par. 13.

On June 20, 2013, TTE entered into a lease agreement ("the 2013 lease") with Empire Wine for Store #3 at 20 West 33<sup>rd</sup> Street, New York, New York. Ex. H. The term of the lease was for 13 years, expiring on June 30, 2026. Ex. H. At the time Park executed the 2013 lease on behalf of Empire Wine, he did not realize that the demised premises consisted of Store #3 and not Store #2.

Park Aff., at par. 14.

On July 2, 2013, Park wrote to Levy and asked the latter to countersign a letter granting plaintiff permission to continue to use Store #3 even in the event it was unable to obtain a liquor license. Levy countersigned the letter granting such permission. Ex. I. According to Park, after he advised Levy that Empire Wine could not obtain a liquor license, Levy advised him that plaintiff could be the tenant under the 2013 lease (Park Aff., at par. 17), and Kamber continued to issue monthly rent invoices to plaintiff. Ex. A to Reply Aff.

By correspondence dated July 2, 2015, Park, on behalf of plaintiff and Empire Wine, signed a letter to TTE advising the latter that, since Empire Wine had failed to obtain a liquor license, the 2013 lease was “of no force and effect.” Ex. K. Soon after he signed this letter, Park learned that the building had been sold. Park Aff., at par. 25.<sup>3</sup>

On August 12, 2015, Levy sent plaintiff a hand delivered letter to Park requesting that the latter execute an estoppel certificate pursuant to the terms of the 2000 lease by August 21, 2015. Ex. L. When plaintiff failed to sign the estoppel certificate, defendant sent plaintiff a notice of default by Federal Express on April 4, 2016. Ex. A. The notice of default demanded that plaintiff cure the default by executing and delivering the estoppel certificate no later than April 11, 2016. Ex. A.

On April 11, 2011, plaintiff commenced the captioned action by filing a summons and complaint against defendant seeking: 1) a declaration that it is not required to execute the estoppel agreement pursuant to the 2000 lease since TTE permitted it to assume the rights and obligations of Empire Wine pursuant to the 2013 lease; or, in the alternative 2) in the event it is determined that

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<sup>3</sup>Although plaintiff submits no proof regarding the sale of the building, it is evident that it was sold to defendant, as the said entity issued the notice of default.

its rights and obligations are governed by the 2000 lease, an extension of time to cure its default pursuant to the 2000 lease by executing the estoppel certificate. NYSCEF Doc. No. 1.

Plaintiff now moves, by order to show cause: 1) for a *Yellowstone* injunction tolling plaintiff's time to cure the alleged breach of its lease during the pendency of this action pursuant to *First National Stores, Inc. v Yellowstone Shopping Center, Inc.*, 21 NY2d 630 (1968); 2) enjoining defendant 20 West 33<sup>rd</sup> Street Property Owner, LLC, the owner of the premises, from taking any further action to terminate plaintiff's tenancy based on an April 4, 2016 notice to cure served on plaintiff by defendant; and 3) for such other relief as may be just and proper. Defendant opposes the motion.

#### **POSITIONS OF THE PARTIES:**

Plaintiff maintains that it is entitled to a *Yellowstone* injunction because it has established that it holds a commercial lease, that it has received a notice to cure a default, that it requested injunctive relief before the termination of the lease, and that it has the ability to cure the alleged default. Asserting that the 2013 lease remains in effect with plaintiff, and not Empire Wine, as tenant, Park maintains that he was tricked by Levy into signing the July 2, 2015 letter admitting that the 2013 lease was "of no force and effect." Ex. K. In support of this contention, plaintiff relies on the affidavit of Joseph Kang, an individual with whom he had a "business relationship." Ex. J, at par. 2. In his affidavit dated April 11, 2016, Kang states that, on July 2, 2015, he saw a man, whom he later learned was the superintendent of the building, pressuring Park to sign a letter immediately. Ex. J.

In an affidavit in opposition, Levy states that the 2013 lease was conditional upon Park

obtaining a liquor license. He maintains that, since Park never obtained a liquor license, the 2000 lease remains in full force and effect despite the execution of the conditional 2013 lease. He vehemently denies that he or anyone else on his behalf pressured Park to execute the July 2, 2015 letter admitting that the 2013 lease was of no force and effect. He further maintains that Park's letter dated July 2, 2013 (Ex. I), in which Park requested consent to use plaintiff's "current lease" in the event he (Park) could not obtain a liquor license, supports defendant's claim that the 2000 lease was to remain in effect if no such license could be obtained. Finally, Levy denies that he ever granted plaintiff consent to operate as a gift shop pursuant to the terms of the 2013 lease.

In an affidavit in opposition, Kevin Chisholm, a principal of defendant, asserts that the 2000 lease is the only agreement governing plaintiff's tenancy at the premises.<sup>4</sup>

In reply, Park argues that the fact that Levy sent him rent invoices c/o Empire Wine confirms that plaintiff's tenancy at the premises was based on the 2013 lease. He also reiterates that his signature on the July 2, 2015 letter was obtained by deceit and fraud.

#### CONCLUSIONS OF LAW:

"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." *Graubard Mollen Horowitz Pomeranz & Shapiro v 600*

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<sup>4</sup>Although defendant is represented by counsel (*see* NYSCEF Doc. Nos. 15 and 22), neither an attorney affirmation nor a memorandum of law was submitted in opposition to the application. Additionally, this Court notes that, in their affidavits in opposition, neither Levy nor Chisholm posits any legal basis supporting their respective arguments.

*Third Ave. Assocs.*, 93 NY2d 508, 514 (1999). The Court of Appeals has noted that, in routinely granting *Yellowstone* applications to further this State's policy disfavoring forfeitures, the courts accept "far less than the normal showing required for preliminary injunctive relief." *Village Ctr. for Care v Sligo Realty & Serv. Corp.*, 95 AD3d 219, 222 (1<sup>st</sup> Dept 2012), quoting *Post v 120 East End Ave. Corp.*, 62 NY2d 19, 25 (1984).

In order to obtain a *Yellowstone* injunction, a party must establish that: "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." *Graubard Mollen*, 93 NY2d, at 514, quoting *225 East 36<sup>th</sup> St. Garage Corp. v 221 East 36<sup>th</sup> Owners Corp.*, 211 AD2d 420, 421 (1<sup>st</sup> Dept 1995).

This Court has examined the foregoing factors and concludes that plaintiff is clearly entitled to a *Yellowstone* injunction. Initially, plaintiff demonstrates that it holds a commercial lease for either Store #2 pursuant to the 2000 lease (Exs. B-G) or Store #3 pursuant to the 2013 lease. Ex. H. Next, plaintiff received a notice of default from defendant dated April 4, 2016. Ex. A. Further, plaintiff requested injunctive relief on April 11, 2016, prior to the termination of the 2000 lease, which lease, by the terms of the notice of default, was to be terminated that day. Ex. A; NYSCEF Doc. No. 16. Finally, as Park states in his affidavit, plaintiff is prepared, and maintains the ability to, cure the alleged default, i.e., failing to execute the estoppel certificate, should this Court determine that the 2000 lease, and not the 2013 lease, governs the tenancy. Park Aff., at par. 28.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff Worldwide Gifts Inc.'s application for a *Yellowstone* injunction is granted; and it is further,

ORDERED that defendant 20 West 33<sup>rd</sup> Street Property Owner, LLC and its employees, servants, agents, attorneys, affiliates, partners and all other persons acting on its behalf are enjoined and restrained from taking any steps to terminate plaintiff's tenancy based upon defendant's notice of default, dated April 4, 2016, or taking any action to terminate plaintiff's lease dated December 4, 2000 for Store #2 at 20 West 33<sup>rd</sup> Street, New York, New York and plaintiff's lease dated June 20, 2013 for Store #3 at 20 West 33<sup>rd</sup> Street, New York, New York by, without limitation, serving any termination notice or commencing summary proceedings, or taking any action to oust plaintiff from the said premises pending a determination of the captioned action; and it is further,

ORDERED that the time of plaintiff to cure any default under the said notice to cure is tolled until such time as this Court has determined that such default has occurred and plaintiff has had at least 30 days after the service, with notice of entry, of a copy of the order determining this action, to cure or to begin to cure, and, thereafter, to diligently proceed to cure any default as may be found by this Court; and it is further,

ORDERED that the parties appear for a preliminary conference in the captioned action on April 4, 2017 at 80 Centre Street, Room 280 at 2:30 p.m., and it is further,

ORDERED that this constitutes the decision and order and decision of the court.

DATED: January 31, 2017

ENTER:

A handwritten signature in black ink, appearing to read "Kathryn E. Freed", is written over a horizontal line.

Hon. Kathryn E. Freed, J.S.C.