

**Remedy Hospitality Group LLC v Street Five 116
LLC**

2017 NY Slip Op 30856(U)

April 24, 2017

Supreme Court, Kings County

Docket Number: 506851/2016

Judge: Sylvia G. Ash

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of April, 2017.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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REMEDY HOSPITALITY GROUP LLC,

Plaintiff,

- against -

STREET FIVE 116 LLC,

Defendant.

-----X

The following papers numbered 1 to 7 read herein:

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

Opposing Affidavits (Affirmations) _____

Reply Affidavits (Affirmations) _____

DECISION AND ORDER

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Mot. Seq. 2, 3

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Upon the foregoing papers, Plaintiffs' motion seeking a *Yellowstone* injunction is GRANTED and Defendant's cross-motion for declaratory judgment and a preliminary injunction directing Plaintiff to cease all business at the premises is DENIED.

Background

Plaintiff, REMEDY HOSPITALITY GROUP LLC, which is operated as a restaurant/bar known as Two Door Tavern, is one of two commercial tenants in the building located at 116 North 5th Street in Brooklyn, New York (hereinafter referred to as the "Premises"). Plaintiff became a tenant in January 2011 when it was assigned the lease dated November 2009 by the initial tenant with the consent of Plumbridge Realty Corp. ("Plumbridge"), Defendant's predecessor-in-interest. The initial lease was amended by an Amendment to Lease dated March 24, 2011 between Plaintiff and Plumbridge. Taking into account a one-year renewal option, Plaintiff's lease expires on November 30, 2020.

Plaintiff received a Notice to Cure dated August 18, 2016 (“Default Notice”), which sets forth five alleged defaults under the lease:

“(1) Pursuant to Paragraph 57 of the Lease as amended by Paragraph 6 of the Amendment, you must vacate “Hallway A”...and remove therefrom any and all closets built into the corridor which have narrowed the corridor and remove any and all compressors mounted on the top of the closets, as said closets and compressors narrow the width of the hallway...and...violates the NYC Building Code as this Hallway A is used as a means of egress.”

“(2) In violation of Paragraph 7 of the Amendment you constructed a mezzanine over and into “Hallway B” which has resulted in a reduction of the ceiling height of Hallway B...[y]ou must remove the mezzanine...so that it meets the egress requirements pursuant to the New York City Building Code....”

“(3) Pursuant to NYC DEP Sewer Use Regulations (15 RCNY Chapter 19) grease interceptors shall be installed in the restaurant...as such you must remove the current grease interceptor from the basement and have it installed within the restaurant’s kitchen.”

“(4) There is currently no Certificate of Occupancy or letter of no objection associated with this building....”

“(5) On June 28, 2016, an ECB Violation...was issued for the subject premises for “failure to maintain building wall(s) or appurtenances,” as a result of your removal of the metal beams/signage from the front of the building. As such, you must take the necessary steps to comply and satisfy this violation....”

On September 30, 2016, Plaintiff filed the instant application for a *Yellowstone* injunction arguing that the Default Notice improperly seeks to have Plaintiff correct building conditions for which Plaintiff has no obligation, alleges that Plaintiff created conditions that are pre-existing and which the prior owner either created or waived, and alleges defaults that do not even exist. It is Plaintiff’s position that Defendant has engaged in a campaign to terminate Plaintiff’s leasehold

interest and evict it from the Premises to make the Premises more attractive for sale, as evidenced by a sales listing marketing the Premises for over \$10 million dollars.

With regards to items 1 and 2 in the Default Notice, Plaintiff argues that Defendant has failed to identify the specific rule, law or regulation that is allegedly being violated by reason of the existing closets, compressor or mezzanine. Further, that the closets, compressor and mezzanine were in use by the initial tenant¹ under the lease and which Plumbridge acknowledged were part of the leased premises in the amendment to the lease. Moreover, that the mezzanine dates as far back as 1999 as evidenced by a printout of a 1999 ECB violation that was issued because the mezzanine had no railing. Plaintiff also states that neither "Hallway A" nor "Hallway B" is used for egress as "Hallway A" ends in a solid sheetrock wall and "Hallway B" ends in a sheetrock wall with a door leading to an area in the back of the building behind the restaurant that is vacant.

With regards to item 3 in the Default Notice, Plaintiff states that a grease interceptor is properly installed in its kitchen and that it did not install the one located in the basement. Plaintiff submits that the basement grease interceptor appears to be servicing the entire building but even if it was installed for the sole use of the Premises, the lease, at paragraph 46[c], specifically permitted such installation.

With regards to item 4 in the Default Notice, Plaintiff contends that its use of the Premises as a restaurant is permitted by the Letter of No Objection dated August 10, 2010 ("LNO") issued by the NYC Department of Buildings ("DOB").

Lastly, Plaintiff contends that the ECB violation referenced in item 5 in the Default Notice, concerning repair of the front of the building, is Defendant's responsibility. That although Defendant attempts to blame the Premise's condition on Plaintiff's removal of the subject metal signs and beams, such removal could not have caused the condition because the metal signs and beams were not affixed to the building. Further, that Defendant refused to cooperate with Plaintiff in its attempt

¹ The initial tenant under the lease operated a French bistro called Moda.

to file a certificate of correction after Plaintiff removed the signs and beams and paid \$5,800.00 in fines.

Although Plaintiff's position is that it has committed no defaults under the lease, in the event that the Court determines that a default exists, Plaintiff expresses that it is ready, willing and able to cure any default.

In opposition and by way of cross-motion for a declaratory judgment, Defendant proffers a letter dated July 15, 2016, from the DOB rescinding its LNO. Defendant therefore argues that it is entitled to a preliminary injunction ordering Plaintiff to cease and desist its use of the Premises as a restaurant until it obtains a proper Certificate of Occupancy. Defendant also proffers the opinion of Benjamin Leonardi, an architect, who states, among other things, that the "means of egress have been compromised" by the mezzanine and closets which "illegally [narrow] the corridor width and [corrupt] the integrity of the corridors purpose." Based on the foregoing, Defendant argues that Plaintiff must remove the closets and mezzanine.

In reply, Plaintiff argues that Defendant should be prohibited from obtaining equitable relief because Defendant, in bad faith, engineered Plaintiff's default by demanding that the DOB rescind the 2010 LNO. In support, Plaintiff proffers a copy of an undated letter by Jerry Lebedowicz, Defendant's principal, to the DOB stating "I want the Letter of No Objection rescinded or revoked." According to Plaintiff, Mr. Lebedowicz sent this letter along with an uncertified copy of the building's 1930 Certificate of Occupancy listing the use of the property as a parking garage to the DOB to induce the revocation of the LNO. Apparently, the DOB did not have record of the 1930 Certificate of Occupancy when it issued the 2010 LNO. Plaintiff states that it has been operating a restaurant at the Premises for the past six years, and that before its occupancy, the space has been occupied by other restaurants since at least 2005. That accordingly, there is no reason to believe that the Premise's use as a restaurant has suddenly become dangerous.

Discussion

The purpose of the *Yellowstone* injunction is to preserve the status quo such 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 Third Ave. As...*, 93 NY2d 508, 514 [Ct App 1999]). “The party requesting a *Yellowstone* injunction must demonstrate 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’” (*Id. quoting 225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421 [1st Dept 1995]). Moreover, the “ability” to cure can be supplanted by a willingness to do whatever is necessary to cure the default paired with a potential means to cure said default (*see Marathon Outdoor, LLC v Patent Constr. Sys. Div. of Harsco Corp.*, 306 AD2d 254, 255 [2d Dept 2003]).

Here, it is clear that Plaintiff has met all of the requirements for *Yellowstone* relief. In fact, the Court finds that Plaintiff is not in default with regards to items 1 and 2 in the Default Notice. The affidavit of Defendant’s architect fails to cite a single statute or building code provision that Plaintiff has violated by virtue of the existing closets and mezzanine. The Default Notice suffers from the same defect. Merely stating that the closets and mezzanine are illegal without reference to any standard by which the Court can measure legality is woefully insufficient.

The Court additionally finds that Plaintiff is not in default with regards to items 3 or 5 in the Default Notice. Defendant does not dispute that Plaintiff has a grease interceptor installed in the kitchen of its restaurant. Thus, contrary to what is stated in the Default Notice, Plaintiff cannot be in violation of any regulation requiring a grease interceptor to be installed inside of the restaurant. Plaintiff also established that its removal of the subject metal signs and beams did not cause the

building façade's condition as they were never affixed to the façade in the first place. Moreover, Defendant fails to dispute that, under the lease, repair of the façade is the landlord's responsibility.

Finally, as of July 15, 2016, pursuant to Defendant's request, the DOB rescinded the 2010 LNO thereby rendering Plaintiff's current use of the Premises as a restaurant invalid. However, all is not lost as Plaintiff has demonstrated its desire and ability to cure the freshly created default, which can be effectuated by obtaining a new Certificate of Occupancy or an amendment to the current Certificate of Occupancy (*see 109th & First Ave. Corp. v 2113 First Ave., LLC*, 51 AD3d 487, 487 [1st Dept 2008]). Moreover, the Court is confident that Defendant will cooperate with Plaintiff in obtaining the amendment to the Certificate of Occupancy that Plaintiff needs, if only to negate Plaintiff's seemingly supported claims of bad faith and unclean hands against Defendant. Based on the foregoing, Plaintiff is entitled to a *Yellowstone* injunction staying the termination of its lease and affording it a reasonable period to complete a cure.

Accordingly, it is hereby

ORDERED that Plaintiff's motion seeking a *Yellowstone* injunction is GRANTED and that Plaintiff shall post a nominal undertaking in the amount of \$1,000.00 within 30 days; and it is further

ORDERED that Defendant's cross-motion is DENIED in its entirety.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.