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 29th day of June, 2017.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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DISCOUNT COLUMBIA LLC.,

Plaintiff(s),

- against -

BOGOPA-COLUMBIA, INC.,

Defendant(s).

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DECISION AND ORDER

Index # 513358/2016

The following papers numbered 1 to 4 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	2
Reply Affidavits (Affirmations)	3
Sur-reply	4

Upon the foregoing papers, Plaintiff's motion for a *Yellowstone* injunction is hereby GRANTED.

Background

Plaintiff, DISCOUNT COLUMBIA LLC, is the sub sub-tenant of 498 Columbia Street in Brooklyn, New York (hereby referred to as the "Leased Premises") pursuant to a sublease between Defendant, BOGOPA-COLUMBIA, INC. ("Bogopa"), and Plaintiff's predecessor-in-interest, Dollar One, Inc. ("Dollar One"). Dollar One assigned the sublease to Plaintiff pursuant to an Assignment and Assumption of Lease dated February 11, 2010. The lease expires on April 22, 2021.

At issue are certain notices of default issued to Plaintiff by Bogopa between March and August 2016 which allege that Plaintiff defaulted on the Lease by failing to obtain adequate insurance for the Leased Premises. Specifically, the Notice of Default dated August 26, 2016 states that Plaintiff has "failed to carry the required umbrella policy of $3,000,000.00 or insurance policies totaling $5,000,000.00, and further failed to carry the required property damage insurance of not less than $300,000.00."

In seeking the instant *Yellowstone* injunction, Plaintiff submits, without admitting to any default, that it has already produced to Bogopa proof that it had the requisite insurance from October 7, 2015 to October 7, 2017. Plaintiff further argues that, to the extent it did not have adequate insurance when it occupied the Leased Premises from 2010 to 2015, Bogopa waived strict compliance of the insurance provision or is equitably estopped from enforcing them. In this regard, Plaintiff contends that, from 2010 to October 2015, Plaintiff always provided Bogopa certificates of liability insurance with $2,000,000.00 liability insurance plus $4,000,000.00 general aggregate and $300,000.00 property damage insurance. That such proof of insurance was provided to, among others, Yolanda S. Farrell, Bogopa's Compliance Coordinator, in January and October 2011; to David Chung, Bogopa's Chief Financial Officer, in June 2013; to Kevin Bai at Bogopa's office in June 2014; and to Michele Ji at Bogopa's office on July 7, 2015. Further, that during that time, Bogopa never objected to the adequacy of Plaintiff's insurance coverage. It is Plaintiff's position that, upon further discovery, there will be more evidence that Bogopa always accepted and approved Plaintiff's insurance coverage.

Plaintiff also seeks leave to file an amended complaint adding two causes of action which address the Third Notice of Default on the basis that said Notice of Default was issued after the initial complaint was filed.

Although Bogopa does not oppose that portion of Plaintiff's application seeking to amend its complaint, Bogopa argues that injunctive relief must be denied because Plaintiff's failure to maintain the requisite insurance coverage constitutes an incurable and material default. In addition, Bogopa contends that the proffered certificates of insurance attached to Plaintiff's moving papers do not constitute conclusive proof of coverage since they are not equivalent to a contract to insure.

In reply, Plaintiff proffers its insurance policy declarations from October 2014 through October 2017.

Discussion

"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 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]). Morever, 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]).

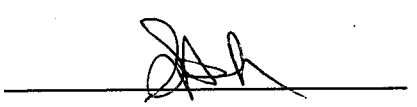
Here, the first, second and third prongs of a *Yellowstone* injunction are not in dispute. With regards to the fourth prong, contrary to Bogopa's arguments, the Court finds that Plaintiff has the potential means to cure the alleged default. Unlike the situation in *JT Queens Carwash, Inc. v 88-16 N. Blvd.*, LLC, 101 AD3d 1089 [2d Dept 2012], a case relied upon by Bogopa, there is no assertion that Plaintiff ever failed to name Bogopa as an additional insured. It is Plaintiff's position that it has continuously carried insurance from its tenancy and Plaintiff has provided partial proof in this regard. In addition, Bogopa fails to dispute the possibility of Plaintiff obtaining an amendment to its existing policy to provide for retroactive umbrella coverage (*see Federated Retail Holdings, Inc. v Weatherly 39th St., LLC*, 32 Misc 3d 247, 253-54 [Sup Ct, NY County 2011]). While the Court has already afforded Plaintiff time to obtain retroactive coverage, that Plaintiff was unable to procure such coverage within three months does not mean that Plaintiff will be unable to do so.

Moreover, the Court finds there is an issue as to whether Bogopa waived its objections to the adequacy of Plaintiff's insurance coverage by waiting six years to voice their objections despite allegedly receiving proof of Plaintiff's insurance coverage from year to year (*see Searle Blatt & Co. v Zurich Holding Co.*, 282 AD2d 388, 389 [1st Dept 2001]).

Accordingly, Plaintiff's application to amend its complaint and for a *Yellowstone* injunction is hereby GRANTED and Plaintiff shall post an undertaking in the amount of $20,000.00 no later than August 4, 2017.

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.