

**M.J.G. Merchant Funding Group LLC v  
MatlinPatterson Global Advisers LLC**

2018 NY Slip Op 31537(U)

February 5, 2018

Supreme Court, New York County

Docket Number: 657502/2017

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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M.J.G. MERCHANT FUNDING GROUP LLC,  
Plaintiff,

INDEX NO. 657502/2017

MOTION DATE 12/21/2017

- v -

MOTION SEQ. NO. 001

MATLINPATTERSON GLOBAL ADVISERS LLC,  
Defendant.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this application to/for PREL INJUNCTION/TEMP REST ORDR

HON. SALIANN SCARPULLA:

Plaintiff M.J.G. Merchant Funding Group, LLC (“Merchant”) moves for a *Yellowstone* injunction (see *First Nat. Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630 (1968)), to stay defendant MatlinPatterson Global Advisers LLC (“MatlinPatterson”) from terminating a sublease agreement between the parties (the “Sublease”). The Sublease is dated as of July 7, 2017, became effective on July 14, 2017, and covers the 9<sup>th</sup> floor of 70 East 55<sup>th</sup> Street, New York, NY (“the Premises”). The Sublease is set to expire on December 30, 2019. In addition to its express terms, the

Sublease also incorporates the terms of the lease between MatlinPatterson and the Prime Landlord (the "Underlying Lease").<sup>1</sup>

The parties began having issues soon after the Sublease was executed. First, the parties disputed the application of a free rent allowance provided to Merchant. Pursuant to the Sublease, Merchant was granted "the right to use and occupy the Subleased Premises free of fixed rent for the first two (2) months following the Commencement Date." Sublease Article 6, section 6.01(c). In the Sublease, the Commencement Date is defined as "the date Sublessor receives Prime Landlord's consent to this Sublease." Sublease, Article 2, section 2.01. It is undisputed that the Prime Landlord consented to the Sublease on July 14, 2017. Thus, July 14, 2017 is the Commencement Date of the Sublease.

Notwithstanding the foregoing, Merchant claims that the parties had agreed that the free rent allowance would begin in September 2017, the month in which Merchant allegedly began occupying the Premises, not on the Commencement Date of the Sublease.

Next, the parties disputed whether Merchant had complied with its obligation to pay a security deposit. Sublease Article 21, section 21.01 of the Sublease provides that:

Upon execution [of the Sublease], Subtenant shall deliver to Sublessor a letter of credit, in the form described in Section 21.02 below, in the amount equal to \$90,199.38 as security ("Security") for the faithful performance and observance by Subtenant of the terms, provisions and conditions of this Sublease.

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<sup>1</sup> Article 3, section 3.01 of the Sublease provides that the Sublease is "in all respects subject and subordinate to the terms and conditions of the Underlying Lease."

In addition, section 21.02 of the Sublease provides that:

The Security shall be in the form first approved by Sublessor and shall be an irrevocable, Evergreen, clean, commercial letter of credit issued by a commercial bank first approved by the Sublessor . . .

Finally, section 21.03 of the Sublease provides that:

Upon execution of this Sublease and notwithstanding anything to the contrary contained herein, Subtenant shall be permitted to deposit a cash security deposit in the amount of \$90,199.38 (the "Cash Security") with Sublessor in lieu of the letter of credit . . . which Sublessor shall hold as security for the faithful performance and observance by Subtenant of the terms, covenants and conditions of this Sublease. On or before sixty (60) days after the date of this Sublease, Subtenant shall deliver the Security in the form of a letter of credit to Sublessor (in the form required by Section 21.02).

Robert H. Weiss ("Weiss"), the general counsel of MatlinPatterson, submitted an affidavit in opposition to the *Yellowstone* injunction application, in which he averred that, in June 2017, Merchant provided a check for the security deposit (the "June Check"); that in September 2017 Merchant requested that MatlinPatterson return the June Check and replaced it with a new check (the "September Check"); that the September Check was immediately returned for insufficient funds; and that Merchant then gave MatlinPatterson a bank check dated September 18, 2017 for the security deposit (the "Bank Check Security Deposit"). Merchant never replaced the Bank Check Security Deposit with a letter of credit, as required by the Sublease.

Weiss also explained that the security deposit requirement is a critical, material term of the Sublease, because a letter of credit security deposit permits MatlinPatterson to collect rent from the third-party issuer of the letter of credit in the event of Merchant's

bankruptcy. In contrast, a cash security deposit would remain an asset of Merchant's in a bankruptcy proceeding.

By letter dated November 10, 2017, MatlinPatterson gave notice to Merchant that it was in default of the Sublease for its failure to pay October 2017 and November 2017 rent (the "First Notice to Cure"). In the First Notice to Cure MatlinPatterson stated that it had applied Merchant's free rent allowance to the two-month period between July 14, 2017 and September 13, 2017; that Merchant's first rent payment became due on October 14, 2017;<sup>2</sup> and that Merchant had subsequently failed to pay October 2017 and November 2017 rent. MatlinPatterson demanded that Merchant cure its rent default by November 21, 2017.<sup>3</sup>

MatlinPatterson also served a second notice to cure dated November 10, 2017 (the "Second Notice to Cure"). In the Second Notice to Cure MatlinPatterson gave notice of Merchant's default under the Sublease for its failure to provide the requisite letter of credit for the security deposit. MatlinPatterson demanded that Merchant cure this default by December 19, 2017.<sup>4</sup>

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<sup>2</sup> Weiss avers that in June 2017, Merchant paid \$25,771.25 by check for the first month's rent, *i.e.*, September 14, 2017 to October 13, 2017.

<sup>3</sup> Pursuant to Article 18, section 18.01 of the Underlying Lease, Merchant was afforded a five-day cure period to cure a default in the payment of rent.

<sup>4</sup> Pursuant to Article 18, section 18.01 of the Underlying Lease, Merchant was afforded a thirty-day cure period to cure defaults other than a default in the payment of rent.

The First Notice to Cure and Second Notice to Cure were accompanied by a letter, in which MatlinPatterson stated that it had drawn down \$40,374.96 from the Bank Check Security Deposit to pay the October 2017 and November 2017 rent. Further, MatlinPatterson demanded that Merchant immediately replenish its security deposit by that amount, and again demanded that Merchant exchange the Bank Check Security Deposit with a letter of credit.

Merchant failed to cure the rent default within the time set forth in the First Notice to Cure. Accordingly, on December 1, 2017, MatlinPatterson sent Merchant a Notice of Termination, in which MatlinPatterson stated that “pursuant to Section 12.01 of the Sublease and Article 18.01(b) of the Underlying Lease, the Sublease and the Term shall expire and terminate five (5) days from the date of the service of this Notice of Termination, *i.e.*, on December 12, 2017.”<sup>5</sup>

On December 7, 2017, Merchant sent MatlinPatterson checks, post-dated for December 11, 2017, in the amount of the unpaid October 2017 and November 2017 rent. MatlinPatterson returned these checks to Merchant.

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<sup>5</sup> Section 18.01(b) of the Underlying Lease provides that:

This lease and the estate hereby granted are subject to the limitation that if an Event of Default shall occur, then, in any such case, Landlord may give to Tenant a notice of intention to end the Term at the expiration of the period of five (5) days from the date of the service of such notice of intention, and, upon the expiration of such 5-day period, this lease and the term and estate hereby granted, whether or not the term shall theretofore have commenced, shall terminate with the same effect as if that day was the day herein definitely fixed for the end and expiration of this lease, but Tenant shall remain liable for damages as hereinafter provided.

On December 22, 2017, Merchant brought this order to show cause seeking a temporary restraining order and, ultimately, a *Yellowstone* injunction. Justice Shulman issued a temporary restraining order on December 26, 2018. I heard oral argument on the *Yellowstone* injunction application on January 17, 2018 and again on January 31, 2018.

### Discussion

To obtain a *Yellowstone* injunction, “the commercial tenant 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.” *Empire State Bldg. Assoc. v. Trump Empire State Partners*, 245 A.D.2d 225, 227- 228 (1<sup>st</sup> Dept. 1997) (citations omitted).

In support of its request for a *Yellowstone* injunction, Merchant argues that it has satisfied the requirements for such relief, *i.e.*, that it is the tenant under the Sublease, that it received notices to cure from MatlinPatterson, that it is seeking relief prior to the termination of the Sublease, and that its defaults have been cured or are able to be cured. Merchant further argues that, because MatlinPatterson sent confusing and contradictory notices to cure, even if this *Yellowstone* injunction application is late, I should not consider the Sublease terminated.

In opposition, MatlinPatterson first states that, because it drew down on the Bank Check Security Deposit to pay the October 2017 and November 2017 rent, it withdraws its First Notice to Cure and the subsequent Termination Notice relating to the rent default

for those months. MatlinPatterson nevertheless argues that Merchant has improperly requested a *Yellowstone* injunction after the expiration of the cure period set forth in the Second Notice to Cure. MatlinPatterson also argues that Merchant has failed to show that it can cure the letter of credit default set forth in the Second Notice to Cure.

Finally, MatlinPatterson points out that, since its drawdown on the Bank Check Security Deposit, Merchant has failed to pay December 2017 rent, failed to pay January 2018 rent, and has not replenished the security deposit by the amount of the drawdown. MatlinPatterson argues that Merchant's continuing failure to pay any amount due under the Sublease further demonstrates its inability to cure its' defaults.

#### **The Timing of the *Yellowstone* Injunction Application**

A commercial tenant seeking a *Yellowstone* injunction must move for this relief prior to the expiration of the cure period set forth in the notice to cure. *Three Amigos Rest. v. 250 W. 43 Owner, LLC*, 144 A.D.3d 490 (1<sup>st</sup> Dept. 2016); *B Gallery, LLC v. 875 W. 181 Owners Corp.*, 76 A.D.3d 909, 909 (1st Dep't 2010) ("We reject plaintiff's contention that a *Yellowstone* application brought after the expiration of the applicable cure period will be deemed timely as long as it is made before the lease in question is actually terminated."). Here, the Second Notice to Cure required Merchant to substitute the Bank Check Security Deposit with a letter of credit by December 19, 2017. It is undisputed that Merchant did not do so, and did not seek a *Yellowstone* injunction until December 22, 2017, three days after the cure period had expired.

Merchant claims that its time to cure the letter of credit default was extended to December 22, 2017 by virtue of Article 11, section 11.01 of the Sublease. That section provides that:

The time limits provided in the Underlying Lease for the giving of notices, making demands, performance of any act, condition or covenant, or the exercise of any right, remedy or option, are changed for the purposes of this Sublease, by lengthening or shortening the same in each instance by three (3) days, as appropriate, so that notices may be given, demands made, or any act, condition or covenant performed, or any right, remedy or option hereunder exercised, by [MatlinPatterson or Merchant], as the case may be (and each party covenants that it will do so), within the time limit relating thereto contained in the Underlying Lease. [MatlinPatterson] shall, no later than three (3) business days after receipt thereof, give to [Merchant] a copy of each notice and demand received from Prime Landlord concerning the [] Premises and shall within such time give to Prime Landlord a copy, or the substance of, each notice and demand received from [Merchant] concerning the [] Premises.

Merchant misconstrues section 11.01 of the Sublease. This provision gives flexibility to MatlinPatterson to comply with the time limits provided in the Underlying Lease, it does not automatically extend all Sublease cure periods by three days.

Even if Section 11.01 of the Sublease did require the automatic addition of three days to the cure periods set forth therein, Merchant's *Yellowstone* injunction application is still untimely. MatlinPatterson sent the Second Notice to Cure on November 10, 2017. A thirty-three day cure period would end on December 13, 2017. Merchant did not seek a *Yellowstone* injunction until December 22, 2017. Thus, even under Merchant's

interpretation of section 11.01 of the Sublease, its December 22, 2017 application for a *Yellowstone* injunction was untimely.<sup>6</sup>

### Merchant's Ability to Cure Its Default

MatlinPatterson also argues that Merchant has failed to show that "it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises." As to this requirement, "the proper inquiry is whether a basis exists for believing that the tenant desires to cure and could do so through any means short of vacating the premises." *Herzfeld & Stern v. Ironwood Realty Corp.*, 102 A.D.2d 737, 738 (1<sup>st</sup> Dept. 1984); *see also WPA/Partners LLC v. Port Imperial Ferry Corp.*, 307 A.D.2d 234 (1<sup>st</sup> Dept. 2003) (same).

In his affidavit in support of the *Yellowstone* injunction application, P. Robert Angona ("Angona"), the CEO of Merchant, averred that he "went to [MatlinPatterson's] bank (Citibank) to request the LC. I was advised by Citibank that it does not provide LCs any longer. I went to other banks and was advised the same thing - no LC was available." Angona further avers that "I advised [MatlinPatterson] that I could not provide the Security Deposit in the form of an LC." Based on these sworn statements, there is no basis for believing that Merchant would ever be able to cure the letter of credit default.

At oral argument of the *Yellowstone* injunction application on January 17, 2018, Merchant's counsel claimed for the first time that, despite Angona's sworn statements,

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<sup>6</sup> In fact, MatlinPatterson was more generous to Merchant than was required by the Sublease, even after adding the additional three days Merchant claims it is afforded thereunder. Rather than thirty-three days, MatlinPatterson afforded Merchant thirty-nine days to cure the letter of credit default.

Merchant would be able to obtain a letter of credit for the security deposit. I then adjourned the *Yellowstone* injunction application for two weeks, to January 31, 2018, to permit Merchant to obtain the required letter of credit. I conditioned this two-week adjournment on Merchant's payment of December 2017 and January 2018 rent.

At the adjourned hearing on January 31, 2018, Weiss submitted a supplemental affidavit, in which he averred that Merchant had received two checks for December 2017 and January 2018 rent on January 22, 2018, but both checks had been dishonored on January 25, 2018 for insufficient funds. Angona also submitted a supplemental affidavit, in which he acknowledged that the December 2017 and January 2018 rent checks had been dishonored. Angona claimed, however, that Merchant's bank account had been "hacked," and that the funds to cover the rent checks had been fraudulently wired out of the account.<sup>7</sup>

Further, while Angona stated in his supplemental affidavit that TD Bank had agreed, on January 29, 2018, to provide Merchant a letter of credit, Angona submitted no evidentiary proof from TD Bank to confirm this statement. Nor did Angona explain why Merchant had been unable to obtain a letter of credit from TD Bank between September 2017 and January 29, 2018.

<sup>7</sup> Angona submitted an unauthenticated January 29, 2018 email, allegedly from Citibank to Angona personally (not Merchant). In this email, Citibank stated that it had "identified possible fraud" on Angona's account. The account listed in the Citibank email was not the account on which the bounced checks were drawn.

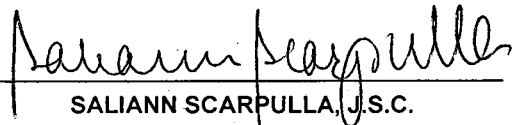
Considering the foregoing, I find that, in addition to the fact that Merchant's *Yellowstone* injunction application is untimely, Merchant has failed sufficiently to show that it can cure its letter of credit default. Therefore, Merchant has not met its burden of proving entitlement to a *Yellowstone* injunction.

In accordance with the foregoing it is

ORDERED that the order to show cause of plaintiff MJG Merchant Funding Group, LLC for a *Yellowstone* injunction is denied, and the temporary restraining order issued by Justice Shulman on December 26, 2017 is vacated.

This constitutes the decision and order of the Court.

2/5/2018  
DATE

  
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:  
CHECK IF APPROPRIATE: