| **Toho Shoji (N.Y.) Inc. v VBG 990 AOA Member LLC** |
| --- |
| 2018 NY Slip Op 31899(U) |
| August 9, 2018 |
| Supreme Court, New York County |
| Docket Number: 153221/2018 |
| Judge: Barbara Jaffe |
|  |
|  |

# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART 12
*Justice*

---X

TOHO SHOJI (NEW YORK) INC.,

Plaintiff,

- v -

VBG 990 AOA MEMBER LLC & VBG 990 AOA LLC

Defendants.

---X

INDEX NO. 153221/2018

MOTION DATE

MOTION SEQ. NO. 1

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number 3, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this application for *Yellowstone* relief

By order to show cause, dated April 10, 2018, plaintiff seeks a *Yellowstone* injunction based on a five-day notice to cure by which defendants alleged certain defaults. (NYSCEF 13). By stipulation dated May 30, 2018, the parties resolved all but the one alleged default addressed here. (NYSCEF 32).

## I. FACTUAL AND PROCEDURAL BACKGROUND

By lease dated November 15, 1991, plaintiff acquired a 20-year leasehold interest in the premises (NYSCEF 8), which was extended to expire on November 30, 2032. In paragraph eight of the lease, plaintiff agrees that

> at [its] sole cost and expense, to maintain general public liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises, effective from the date Tenant enters into possession and during the term of this lease. Such insurance shall be in an amount and with carriers acceptable to the Owner. Such policy or policies shall be delivered to the Owner.

(*Id.*).

By letter dated January 11, 2018, addressed to the tenant of the demised premises, defendant advised that the prior owner of the premises had conveyed all of its right, title, and interest in the premises to VBG 990 AOA LLC, and asked that the tenant amend the insurance policies required pursuant to the lease to include the new owner as an additional insured. (NYSCEF 17).

By letter to plaintiff dated February 6, 2018, defendant VBG 990 AOA LLC introduced itself and asked, among other things, that plaintiff "update your Certificate of Insurance in accordance with Article 8 of the Lease." (NYSCEF 18).

By letter addressed to plaintiff's counsel, dated February 27, 2018, counsel for defendant advised that it had hired a risk management expert to review all insurance policies maintained by tenants. It thus requested, among other things, that plaintiff, as required by paragraph eight of the lease, deliver to it copies of the insurance policies for the past six years by no later than March 5, 2018. Although it acknowledged receipt of plaintiff's certificate of liability insurance, it observed that it was deficient as the certificate holder should be "VBG 990 AOA LLC c/o Vanbarton Group LLC" and asked that certain additional insureds be included. (NYSCEF 19).

By letter to plaintiff dated March 22, 2018, defendant advised that in accordance with its expert's recommendation, it was updating the liability insurance requirements set forth in the lease. It attached a list of updated insurance requirements and required that plaintiff obtain the policies and deliver copies of them to defendant no later than March 31, 2018, with time being of

the essence. It enclosed a sample certificate of liability insurance and observed that plaintiff had not delivered copies of its insurance policies for the past six years or an updated certificate of liability insurance reflecting the new owner as certificate holder along with its related entities as additional insureds, as set forth in its February 27 letter. (NYSCEF 20).

On or about April 5, 2018, plaintiff received a five-day notice to cure from defendant advising, as pertinent here, that it had failed to deliver to it copies of its commercial general liability insurance policies for the past six years, from 2012 to the present, in violation of paragraph eight of the lease, that it failed to comply with the terms set forth in defendant's February 27 and March 22 letters, that it failed to obtain policies of liability insurance in accordance with the updated requirements by March 31, and that it failed to include it as an additional insured as set forth in its January 2018 notice. (NYSCEF 6).

By affidavit dated April 10, 2018, an officer of plaintiff corporation states that he seeks to avoid forfeiture of the lease which has 14 years remaining on it and alleges that defendant "was pressuring [it] to accept a buyout of the remaining 7+ years on the Lease." Thus, he claims that the notice to cure constitutes a pretext to force plaintiff to sell out the balance of the lease which it had held for the past 27 years, having invested "many thousands of dollars in the Premises" and employing 19 people. He otherwise alleges that by email dated March 29, 2018, plaintiff provided defendant with a certificate of insurance which "materially" complies with its demands, and that should it be insufficient, it is "prepared to correct it forthwith." (NYCSEF 5). The emailed certificate reflects, among other things, that VBG 990 AOA LLC, along with the other entities, are set forth as additional insureds on a commercial general liability policy commencing February 12, 2018. (NYSCEF 10).

By affidavit dated April 26, 2018, defendant's principal alleges that plaintiff has failed to deliver copies of the insurance policies to it nor has it stated its readiness, ability, and willingness to cure by indicating that it would deliver the copies of the policies. He moreover maintains that the certificate of insurance furnished by plaintiff reflects a one-month gap in coverage from the date of its January 11 letter advising that it was the new owner and the February 12 commencement date of the commercial liability policy. (NYSCEF 14).

## II. ANALYSIS

A commercial tenant may obtain a stay of the period within which an alleged default must be cured until the merits of the dispute can be resolved in court and to avoid the forfeiture of a substantial leasehold interest. (*First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968]; *Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.*, 93 NY2d 508, 514 [1999]). To obtain a stay, the movant

> 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.*). That a plaintiff denies a default is not dispositive, as long as it evinces a good faith willingness to cure. (*Art Corp. Inc. v Citirich Realty Corp.* 124 AD3d 545, 546 [1st Dept 2015]). In the insurance context, however, a default may be incurable. (*Kim v Idylwood, NY, LLC*, 66 AD3d 528, 529 [1st Dept 2009]).

Here, plaintiff neither asserts nor demonstrates that the policy it furnished covered defendant from the time it became owner of the premises. Consequently, the gap in coverage renders the default is incurable.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for injunctive relief is denied.

8/9/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| CHECK ONE: | ☐ | CASE DISPOSED | | ☒ | NON-FINAL DISPOSITION | | |
| | ☐ | GRANTED | ☒ DENIED | ☐ | GRANTED IN PART | ☐ | OTHER |
| APPLICATION: | ☐ | SETTLE ORDER | | ☐ | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | ☐ | DO NOT POST | | ☐ | FIDUCIARY APPOINTMENT | ☐ | REFERENCE |