| **Adjuva LLC v Williamsburg 39 LLC** |
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| 2018 NY Slip Op 31913(U) |
| August 1, 2018 |
| Supreme Court, Kings County |
| Docket Number: 508114/18 |
| Judge: Leon Ruchelsman |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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ADJUVA LLC and SHELLCO INC.,

Plaintiffs, Decision and order

- against - Index No. 508114/18

MS #1

WILLIAMSBURG 39 LLC, FABRIZIO FERRI and
INDUSTRIA SUPERSTUDIO OVERSEAS, INC.,

Defendants, August 1, 2018

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a Yellowstone injunction. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

On May 1, 2012 the plaintiff tenant entered into a lease with defendant landlord concerning rental of real property located in 29 South 5th Street, Brooklyn, New York in Kings County. The owner served a thirty-day notice to cure on March 19, 2018 and again on March 27, 2018 alleging various defaults. The first notice contained three alleged defaults, namely, the tenant failed to close out an ALT-1 application filed in 2012, failed to diligently pursue completion of construction job filed

in 2012 and failed to provide proof of required general liability insurance. The second notice contained the same defaults as the first notice, adding another default, namely that plaintiff had assigned or sublet their interest without the owner's consent. The plaintiff has moved seeking a Yellowstone injunction arguing either the noted defaults are baseless of that in any event they can be readily cured.

Conclusions of Law

A Yellowstone injunction is a remedy whereby a tenant may obtain a stay, tolling the cure period "so that upon an adverse determination on the merits the tenant may cure the default and avoid forfeiture" (Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc., 93 NY2d 508, 693 NYS2d 91 [1999], First National Stores v. Yellowstone Shopping Center Inc., 21 NY2d 630, 290 NYS2d 721 [1968]). For a Yellowstone injunction to be granted, the Plaintiff must, among other things, demonstrate that "it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises" (Graubard, supra).

Thus, a tenant seeking a Yellowstone must demonstrate that: (1) it holds a commercial lease, (2) it has received from the landlord a notice of default, (3) its application for a temporary

restraining order was made prior to the expiration of the cure period and termination of the lease, and (4) it has the desire to and ability to cure the alleged default by any means short of vacating the premises (see, Xiotis Restaurant Corp., v. LSS Leasing Ltd. Liability Co., 50 AD3d 678, 855 NYS2d 578 [2d Dept., 2008]).

Many of the defaults are disputed by the plaintiff as constituting defaults. Thus, the plaintiff does not assert that it unequivocally is unwilling to cure any defaults (Metropolis Westchester Lanes Inc., v. Colonial Park Homes Inc.,187 AD2d 492, 589 NYS2d 570 [2d Dept., 1992]), but rather no such defaults exist. Therefore, the court will examine the defaults and if such are found to exist, the plaintiff will undoubtedly cure them (see, ERS Enterprises, Inc., v. Empire Holdings LLC, 286 AD2d 206, 729 NYS2d [1st Dept., 2001]).

The first and second default alleges the plaintiff violated the lease by failing to close out their ALT-1 application and to diligently pursue the completion of said construction for the application. Plaintiff alleges that is unable to complete its construction because its co-tenant Industria Superstudio Overseas, Inc., received a stop work order. Since Plaintiff-tenant cannot cure until the stop work order is removed the

default cannot be a valid basis upon which to terminate a lease. Therefore, such defaults are dismissed.

Concerning the allegation of lack of proof of insurance, plaintiff contends that it has shown proof by annexing a copy of its Certificate of Insurance. It is well settled that the failure to maintain insurance and incurable and will result in the denial of a Yellowstone injunction (see, Kyung Sik Kim v. Idylwood NY LLC, 66 AD3d 528, 886 NYS2d 337 [1st Dept., 2009]. Thus, a certificate of insurance is merely evidence of a contract for insurance, not conclusive proof that the contract exists, and not, in and of itself, a contract to insure (Morrison-Knudsen Co. v Continental Cas. Co., 181 AD2d 500, 580 NYS2d 356 [1st Dept., 1992]). Although on its own it is not insurance it is enough to raise an issue of fact Horn Maint. Corp. v. Aetna Cas. & Sur. Co., 225 AD2d 443, 639 NYS2d 355 [1st Dept., 1996]). Therefore, the court will allow for a stay of time, thirty days, during which the plaintiff is ordered to provide adequate proof of insurance.

Regarding the final allegation that plaintiff has assigned or sublet the premises, defendant provides Federal Express mailing slips and bulk food wrappers for chicken cutlets and Martin & Finch catering food labels all addressed to Martin &

Finch at the premises 29 South 5th Street as proof of an unauthorized sublet. Plaintiff contends that Martin and Finch is merely an invitee and is not in possession of the premises. Plaintiff further argues that even if Martin and Finch is considered an illegal sublet he is wiling to cure by telling Martin & Finch to vacate the premises. Since defendant has not brought proof that there indeed was a sublet and that Martin and Finch is not an invitee such default is dismissed.

So Ordered.

ENTER:

DATED: August 1, 2018
Brooklyn NY

Hon. Leon Ruchelsman
JSC