

Woman's Fantasy Inc. v 705-711 Franklin Realty LLC
2018 NY Slip Op 32745(U)
October 22, 2018
Supreme Court, Kings County
Docket Number: 516038/18
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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WOMAN'S FANTASY INC.,

Plaintiff,

Decision and order

- against -

Index No. 516038/18

705-711 FRANKLIN REALTY LLC,

MS # 2

Defendant,

October 22, 2018

-----x
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.

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KINGS COUNTY CLERK
FILED

On October 8, 2013 the plaintiff tenant entered into a lease with defendant landlord concerning the rental of 1730 Sheepshead Bay Road in Kings County. The landlord served a fifteen day notice to cure on July 14, 2018 alleging various defaults, specifically that the plaintiff engaged in unauthorized repairs and that the plaintiff failed to maintain the requisite insurance. The plaintiff has moved seeking a Yellowstone injunction arguing either the noted defaults are baseless or that in any event they can readily be 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 a forfeiture" (Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs., 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, among other things, must 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 expiration of the cure period and termination of the lease, and (4) it has the desire 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])).

The essential default noted, namely the unauthorized construction is disputed by the plaintiff as constituting a default at all. Thus, the plaintiff does not assert that it unequivocally is unwilling to cure any default (Metropolis Westchester Lanes Inc., v. Colonial Park Homes Inc., 187 AD2d 492, 589 NYS2d 570 [2d Dept., 1992]), but rather no such default exists. Therefore, the court will examine the default and if

such are found to exist, the plaintiff will undoubtedly cure it (see, ERS Enterprises, Inc., v. Empire Holdings LLC, 286 AD2d 206, 729 NYS2d 23 [1st Dept., 2001]).

The default alleges the plaintiff violated the lease because plaintiff "demolished and removed a section of the rear exterior load bearing brick wall...in a poor and unsafe manner" (see, Fifteen Day Notice to Cure, paragraph 2). That is a conclusory determination that is likewise disputed by the plaintiff. Furthermore, the plaintiff asserts that the work done did not require any notice to the landlord or any accompanying permits pursuant to other provisions of the lease. Thus, while Article 42 of the rider of the lease, upon which the Notice to Cure is based, requires notice to the landlord and contains numerous other requirements, Articles 43 and 44 permit the tenant to conduct other, lesser, repairs without notice to the landlord. There are questions of fact whether the work done by the plaintiff constituted work pursuant to Article 42 or work pursuant to Articles 43 and 44. Thus, at this juncture the defendant has failed to present sufficient evidence dismissing the Yellowstone injunction. Concerning the default the plaintiff does not maintain insurance, the plaintiff has submitted numerous insurance documentation that appears to render moot the specific allegations of the default. To the extent any information is missing the


plaintiff shall have thirty days from receipt of this order to supplement, if necessary, any missing insurance information.

Consequently, the plaintiff's motion seeking a Yellowstone is granted.

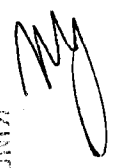
So ordered.

ENTER:

DATED: October 22, 2018
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC


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