

1-800-Flowers.Com, Inc. v 220 Fifth Realty LLC
2018 NY Slip Op 33044(U)
November 29, 2018
Supreme Court, New York County
Docket Number: 150540/2018
Judge: Kathryn E. Freed
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FACTUAL AND PROCEDURAL BACKGROUND:

On or about October 31, 2011, plaintiff leased a portion of the 15th floor of 220 Fifth Avenue, New York, New York (“the premises”) from Dino & Sons Realty Corp. (DSR). Doc. 11.¹ The premises were to be used as office space. Doc. 11 at par. 2.01. The lease was amended on November 9, 2012 to add space on the 17th floor of the premises to the rented area. Doc. 11.² In March of 2017, defendant became net landlord of the premises when it subleased the building from Croisic Building, LLC, which had sublet the building from DSR. Doc. 25 at par. 4. On October 9, 2017, plaintiff exercised an option to extend its lease for five years, until June 23, 2023. Doc. 10 at par. 6. In or about November of 2017, defendant indicated that it was interested in renegotiating or buying out plaintiff’s lease, but plaintiff rejected defendant’s proposals for such a transaction. Doc. 10, at par. 7. A few weeks later, on or about December 20, 2017, plaintiff received a Termination/Cancellation Notice (NOT) from defendant in which defendant claimed that plaintiff had been “late” with certain rental payments and that, as a result, plaintiff’s tenancy would be terminated on January 31, 2018 pursuant to Articles 1.10 and 24.02 of the lease. Doc. 12; Doc. 10 at par. 8. A ledger annexed to the NOT purported to demonstrate that plaintiff was in default because its rent was allegedly “paid late more than three times in [a] twenty-four (24) month period.” Doc. 12. Prior to receiving the NOT, plaintiff had never received a notice of nonpayment pursuant to Article 1.10 or 24.02 of the lease. Doc. 10 at par. 11. Article 1.10 of the lease provided, inter alia, that:

¹ All references are to the documents filed with NYSCEF in this matter.

² This Court notes, however, that plaintiff and defendant both refer to the demised premises as being on the 17th floor.

1.10. In the event [plaintiff] fails to pay any installment of the Fixed Rent or Additional Rent when due and such default shall continue for ten (10) days, then in addition to any other remedy which [defendant] shall be entitled to exercise under the law, in equity or under this Lease, [plaintiff] shall pay as Additional Rent a late charge of ten (10%) percent of the dollar amount in default or five-hundred (\$500.00) per month, whichever is greater upon demand by [defendant]. Furthermore, in the event [plaintiff] issues a bad or returned check, [plaintiff] shall be pay [sic] [defendant] as Additional Rent, a \$200.00 service charge. In the event that rent is paid late more than three times in any twenty four (24) month period or if a check is returned as unpaid more than two times during any twenty four (24) month period, the [defendant] shall have the option of terminating this Lease. . . Notwithstanding anything to the contrary set forth in this lease, [defendant] shall accept all such Fixed Rent, Additional Rent and any other amounts due hereunder by means of electronic transfer and [defendant] shall promptly provide [plaintiff] with its wire transfer information.

Paragraph 24.02 of the lease provides, in pertinent part, as follows:

24.02. This lease and the term and estate hereby granted are subject to the further limitation that: (a) whenever Tenant shall default in the payment of any installment of Fixed Rent, or in the payment of any Additional Rent or any other charge payable by Tenant to Landlord, on any day upon which the same ought to be paid, and such default shall continue for three (3) business days . . . then in any of said cases. . . each being hereinafter referred to an "Event of Default", Landlord may give written notice ("Termination Notice") to Tenant specifying such Event of Default and stating that this Lease and the Terms shall expire and terminate on the date specified in the Termination Notice, which date shall be at least five (5) business days after the giving of the Termination Notice, and on the date specified therein, if the Event of Default has not been cured by the date specified in the Termination Notice, this Lease and the Term and all rights of Tenant under this Lease shall expire and terminate as if that day were the Expiration Date, it being the intention of the Landlord and Tenant hereby to create conditional limitations

Doc. 11.

Plaintiff claims that, as of the date it filed this OSC, it had paid its fixed rent and additional rent in full through January 2018, with the exception of two disputed charges dated

December 1, 2017, one for late fees in the amount of \$5,606.00 and the other for a replacement electric meter in the amount of \$2,142.86. Doc. 27. Despite receiving the NOT based on three or more late rent payments, plaintiff urged that its rent was never late and that, prior to December 1, 2017, it had never received a rent invoice containing a late charge. Doc. 10 at pars. 12, 21. Plaintiff further maintains that, pursuant to paragraph 15 of the lease, it, and not defendant, was obligated to install an electric meter, but that, in any event, defendant had not responded to its request for substantiation of the charge for the meter. Doc. 10 at par. 12. Nevertheless, plaintiff maintains that, if this Court determines that it is in default, it is ready and willing to cure the same. Doc. 10, at par. 25.

LEGAL CONSIDERATIONS:

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. 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" (225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp., 211 AD2d 420, 421).

Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs., 93 NY2d 508, 514 (1999).

Yellowstone relief is designed to prevent the unjustified or premature termination of a valuable leasehold interest by allowing a tenant to challenge, during the pendency of litigation,

its landlord's argument that the lease should be terminated. *See Lexington Ave. & 42nd St. Corp. v 380 Lexchamp Operating*, 205 AD2d 421 (1st Dept 1994). Courts have granted Yellowstone relief "routinely to avoid forfeiture of [a] tenant's interest and in doing so they accepted far less than the normal showing required for preliminary injunctive relief." *Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 25 (1984).

Here, plaintiff has established the criteria necessary for the issuance of a *Yellowstone* injunction. Plaintiff established that: 1) it holds a commercial lease (Doc. 11); 2) defendant/landlord served a NOT on plaintiff threatening to terminate plaintiff's lease on January 31, 2018 based on plaintiff's alleged failure to pay rent on time on three occasions during a 24-month period (Doc. 27); 3) it sought injunctive relief on January 22, 2018, and thus prior to January 31, 2018, the date set forth in the NOT for the termination of the lease (Doc. 18); and 4) it is willing and able to cure the alleged default. Doc. 10 at par. 25.

In establishing that it is willing and able to cure the alleged default, plaintiff relies on the affidavit of Brian McGee, its Senior Vice-President of Real Estate and Construction. Doc. 10. As noted previously, plaintiff disputes two charges on its December 2017 invoice. However, McGee represents that, if this Court deems it necessary, it will cure the default by paying the charges. Doc. 10, at par. 25. Plaintiff has also evinced a desire, on multiple occasions, to take steps towards avoiding the payment of untimely rent by repeatedly requesting that DSR and defendant provide it with "wire transfer information" which defendant, and before it DSR, was required to provide pursuant to the lease. Doc. 10 at par. 15; Doc. 11 at par. 1.10. However, defendant and DSR refused to provide such information. Doc. 10 at par. 15.

Defendant's contention regarding late rent payments by plaintiff appears to be exaggerated given that Johanny Izquierdo, defendant's agent, asserts in an affidavit in opposition that "plaintiff has paid its base rent late on several occasions" despite the fact that only one entry on the ledger submitted with his affidavit reflects a late charge. Doc. 25, at par. 9; Doc. 27.

Although defendant asserts that this OSC must be denied because plaintiff cannot cure its default, this contention is without merit. Specifically, defendant argues that plaintiff's failure to pay rent more than three times in a 24-month period entitles it to terminate the lease pursuant to paragraph 1.10 without serving plaintiff with a notice to cure. However, the NOT was based on paragraph 1.10 *as well as* paragraph 24.04, which requires that defendant provide plaintiff at least five days to cure. Doc. 11. Moreover, as noted above, it is appropriate to grant Yellowstone relief not only where there is a notice to cure or a notice of default served, but also where, as here, the landlord threatens to terminate the leasehold. *See Graubard Mollen Horowitz Pomeranz & Shapiro*, 93 NY2d at 514.

In accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion for a Yellowstone injunction is granted; and it is further

ORDERED that pending determination of the underlying action, the termination of plaintiff's lease is tolled; and it is further

ORDERED that as a condition to the continuation of the injunction, plaintiff shall pay use and occupancy in the amount of rent reserved in the lease as such amounts come due; and it is further

ORDERED that plaintiff shall serve a copy of this order, with notice of entry, within 20 days after this order is uploaded to NYSCEF; and it is further

ORDERED that any arrears in rent that are currently outstanding, other than the two contested charges (for late fees and electric meter installation) shall be paid within 20 days after service of this order with notice of entry; and it is further

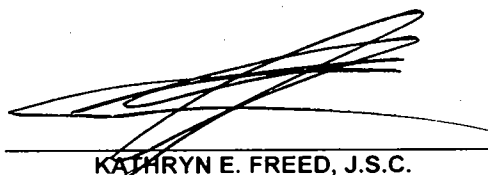
ORDERED that in the event plaintiff fails to make payments as set forth herein, the defendant may move this court to vacate the Yellowstone injunction, and it is further

ORDERED that the parties are to appear for a preliminary conference in this matter on April 9, 2019 at 2:15 p.m., unless this matter is settled or otherwise disposed by that time, in which case the parties are to notify the court of the same in writing in advance of the scheduled conference date; and it is further

ORDERED that any requested relief not expressly addressed herein has been considered by the Court and is denied; and it is further

ORDERED that this constitutes the decision and order of the Court.

<u>11/29/2018</u>			
DATE			
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☒ GRANTED ☐ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE


KATHRYN E. FREED, J.S.C.