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| <b>Bushwick Economic Dev. Corp. v E.N.Y. Plaza LLC</b>                                                                                                                                                                         |
| 2019 NY Slip Op 31459(U)                                                                                                                                                                                                       |
| May 20, 2019                                                                                                                                                                                                                   |
| Supreme Court, Kings County                                                                                                                                                                                                    |
| Docket Number: 505206/19                                                                                                                                                                                                       |
| Judge: Leon Ruchelsman                                                                                                                                                                                                         |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

-----X  
BUSHWICK ECONOMIC DEVELOPMENT CORPORATION,  
Plaintiff,

Decision and order

- against -

Index No. 505206/19

E.N.Y. PLAZA LLC,

Defendant,

ms # 1

May 20, 2019

-----X  
PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a Yellowstone injunction. The plaintiff also seeks to consolidate this action with a non-payment proceeding in Civil Court. 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 March 9, 2009 the plaintiff tenant entered into a lease with landlord concerning the rental of space located at 61 Cooper Street in Kings County. A notice to cure was served on February 19, 2019 alleging various defaults including the fact the tenant did not maintain sufficient 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. The plaintiff also seeks to consolidate this matter with a related proceeding in Civil Court.

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 landlord has alleged that the tenant failed to maintain sufficient insurance regarding the premises. Thus,

Section 12 of the lease states, in handwritten notation, that the tenant shall maintain general liability insurance of \$3,000,000 and an umbrella policy of \$5,000,000 for a total of \$8,000,000. The tenant has submitted a Certificate of Liability Insurance' with an aggregate insurance amount of \$3,000,000.

In JT Queens Carwash Inc., v. 88-16 N. Boulevard, LLC, 101 AD3d 1089, 956 NYS2d 536 [2d Dept., 2012] the court held that the failure to maintain requisite insurance is an incurable default demanding a denial of a Yellowstone injunction. Frank Boswell the executive director of the plaintiff submitted an affidavit and stated that "First and foremost, BEDCO has in fact a comprehensive general liability policy in effect. If there are issues with the insurance coverage, BEDCO is ready, willing and able to cure them" (see, Affidavit of Frank Boswell, ¶ 7). While generally such pronouncements of intentions to cure any defects is a firm basis upon which to grant a Yellowstone, past insurance deficiencies cannot be cured (Kyong Sik Kim v. Idlywood NY LLC, 66 AD3d 528, 886 NYS2d 337 [1<sup>st</sup> Dept., 2009]).

Therefore, based on the foregoing the motion seeking a Yellowstone injunction is denied. Likewise, the motion seeking to consolidate this case with a pending Civil Court

case is denied.

So ordered.

ENTER:



DATED: May 20, 2019

Brooklyn N.Y.

Hon. Leon Ruchelsman

JSC

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