

Marks v Acorn Mach. Corp.
2019 NY Slip Op 31568(U)
June 3, 2019
Supreme Court, New York County
Docket Number: 150289/19
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

MITCHELL MARKS,

INDEX NO. 150289/19

- v -

MOT. DATE

ACORN MACHINERY CORPORATION

MOT. SEQ. NO. 001 and 002

The following papers were read on this motion to/for Yellowstone inj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s). _____

Replying Affidavits

NYSCEF DOC No(s). _____

There are two applications for *Yellowstone* injunctions. In motion sequence 001, plaintiff Mitchell Marks (Marks) moves by order to show cause for a *Yellowstone* injunction tolling the time for plaintiff to cure the alleged violations set forth in the Notice to Cure dated December 11, 2018, staying the notice and staying the defendant from terminating the lease pending the determination of this action. In sequence 002, plaintiff moves again to toll the time for plaintiff to cure the alleged violations of lease set forth in the notice to cure dated February 5, 2019, staying the notice and staying defendant from terminating the lease pending final determination of the action. Defendant Acorn Machinery Corporation (Acorn) opposes both motions.

Plaintiff is a shareholder in a co-op located at 182 Lafayette Street, New York, New York and the proprietary lessee of unit 1 pursuant to a proprietary lease made as of June 22, 2000. The building is comprised of a commercial unit on the ground and cellar levels, known as unit 1, and five full floor residential units on levels two through six. In or about April 2014, plaintiff sub-leased unit 1 to Monster Cycle, LLC (Monster) pursuant to the terms of a store sublease made on or about April 11, 2014. Monster markets itself as an extreme workout facility with loud amplified sound system and intense visual components. Plaintiff, who was the principal of the sponsor that converted the building from a commercial loft building to a residential co-op, was permitted under the terms of the lease to sub-let unit 1 to Monster without the consent of the co-op.

Under Section 2 of the Monster Sublease, Monster Cycle is permitted to use unit 1 for a bicycle fitness facility. An excerpt from the Monster Cycle website shows "NO, THE MONSTER CYCLE IS NOT SCARY... BUT YES WE ARE AN UNAPOLOGETIC, UNCENSORED RIDE. YOU WILL HEAR EXPLICIT LANGUAGE AND MOST LIKELY SEE SOME BAD ASS MUSIC VIDEOS". *** WE ARE A MUSIC VIDEO RIDE, THERE WILL BE VISUALS, STROBING LIGHTS, BLACK LIGHTS, DARKNESS AND A LOUD SOUND SYSTEM. EAR PLUGS ARE AVAILABLE AT THE CHECK IN DESK".

Dated: 6/3/19



HON. LYNN R. KOTLER, J.S.C.

1. Check one:

CASE DISPOSED NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

GRANTED DENIED GRANTED IN PART OTHER

3. Check if appropriate:

SETTLE ORDER SUBMIT ORDER DO NOT POST

FIDUCIARY APPOINTMENT REFERENCE

After continuing complaints from co-op owners, the co-op engaged AKRF, an acoustical engineering firm, to conduct acoustic noise monitoring and to determine whether Monster Cycle was violating the NYC Noise Control Code [NYC Admin. Code Sec. 24-231] (hereinafter "Noise Code"). AKRF performed acoustic noise monitoring at the building in April and May 2018. According to the AKRF report, there were repeated violations of the Noise Code by Monster Cycle during its spin classes under two different provisions of the Noise Code, to wit: (i) Sec. 24-231(a)(1), by regularly exceeding the 42 dB(A) limits permitted for commercial music levels; and (ii) Sec. 24-231(a)(2) pertaining to 45 dB one-third octave band maximums for commercial music. The noise issue continued to worsen and on December 11, 2018, the co-op issued its first Notice to Cure on plaintiff advising him that he was in default of Sections 18(b) and 18(d) of the Lease and House Rule 4 because of continuous loud, disturbing music and amplified voices and vibrations coming from Unit 1 adversely affecting the other residents in the building. The Notice to Cure also alleged violations of paragraph 14 of the Lease Rider and House Rule 10, which have been resolved and are not part of this application.

After the service of the first notice to cure, the co-op's residents continued to complain of excessive noise problems from Monster Cycle's spin classes. In January 2019, the co-op engaged AKRF to perform a short-term survey in unit 2 at the building. AKRF issued a supplemental report dated January 22, 2019, which concluded that "Monster Cycle continues to violate the NYC Noise Code and the Lease with apparent impunity".

On February 5, 2019, defendant served a second notice to cure alleging lease violations pertaining to the illegal construction in unit 1, the illegal use of the Monster Cycle spin studio in violation of the building certificate of occupancy and without a special use permit. Plaintiff filed a second order to show cause for a Yellowstone injunction claiming that he needs more time to cure the alleged violations.

MOTION SEQUENCE 001

Plaintiff argues that without an order tolling the cure period, he will "face imminent loss of the lease and its valuable business and investment". Plaintiff further contends that "I need more time to cure the alleged violations" and that "if relief is not granted, I risk losing a valuable downtown storefront lease that has 77 years remaining, as well as the ownership interest in the cooperative corporation". Plaintiff claims that he is prepared to cure and that he just needs more time.

Defendant vehemently opposes the application and argues that plaintiff has done nothing to abate the excessive noise problems emanating from Unit 1 and the Monster Cycle spin classes, that plaintiff has not submitted any plans or specifications to the co-op board or provided names of any architect or contractor. Defendant further argues that there is no evidence that plaintiff has taken any steps to comply with the Notice to Cure and to stop his subtenant from violating the NYC Commercial Music Noise Code, the lease and house rules.

MOTION SEQUENCE 002

Plaintiff argues that he requires an immediate temporary restraining order because the second notice to cure expires on March 11, 2019 and that he needs more time to cure the alleged violations. Plaintiff also contends that if the relief he seeks is not granted, then he risks losing a valuable downtown storefront lease that has 77 years remaining on it as well as the ownership interest in the cooperative corporation.

Defendant argues that plaintiff has failed to show in his application that he is willing and able to cure the Lease violations pertaining to the illegal construction in unit 1, the illegal use of Monster cycle spin studio in violation of the building certificate of occupancy and the lack of the required special use permit from the NYC Board of Standards and Appeals. Defendant further argues that plaintiff has failed again to present any credible evidence of any good faith effort to bring his sub-lessee into compliance within the applicable law and to cure any of the violations in the notice to cure.

In order to obtain a *Yellowstone* injunction, plaintiff must demonstrate: [1] that he holds a commercial lease; [2] that he received either a notice of default, a notice to cure or a threat of termination of the lease from the landlord; [3] that the motion was made prior to the termination of the lease; and [4] that he is prepared and maintains the ability to cure (*Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs.*, 93 NY2d 508 [1999]).

The thrust of defendant's opposition in both motion sequence 001 and 002 is that plaintiff cannot demonstrate an ability to cure, the fourth requirement for a *Yellowstone* injunction. The court agrees on both motion sequences.

In plaintiff's first application for a *Yellowstone*, plaintiff has woefully failed to demonstrate that not only does it have the ability to cure but that it has made good faith efforts to work to clear the violations of the sub-lease and the house rules. A tenant seeking a *Yellowstone* injunction must also convince the court "of his desire and ability to cure the defects by any means short of vacating the premises" (*Jemaltown of 125th St. v Betesh/Park Seen Realty Assocs.*, 115 AD2d 381, 382 [1st Dept 1985]). Here, plaintiff has not made the requisite showing of its willingness to cure the lease violations and the evidence in this record raises considerable doubt as to plaintiff's good faith.

Plaintiff's barebones conclusory affidavit stating that he has "engaged a contractor to undertake additional soundproofing measures, including installing a sound proof door, soundproofing an 8'x9' section of exposed ceiling and putting down a ¾" to 1" rubber floor in the studio" falls on deaf ears. Plaintiff failed to annex any credible proof from a contractor that it retained to perform the work and/or that the work is currently being performed in unit 1. What is troubling is the supplemental report by AKRF based on additional acoustic survey conducted in mid-January 2019 which evidences noise levels that were not only worse than the levels in the first long term survey conducted in April and May 2018 but also far exceed the noise code levels by 18 decibels. Affidavits from Co-op unit owners attest to the ongoing noise and vibrations during the Monster Cycle spin classes they have experienced in their individual units over the course of years. In plaintiff's affidavit, he avers that "I do not believe the subtenant is unreasonably disturbing other lessees or violating the NYC Noise Code". Plaintiff's claim that ARN Insulation indicate noise levels below the lawful maximum lacks any credible evidence to support that allegation. An additional four days of Unattended Noise Monitoring (3/26/19 to 3/29/19) in the second-floor residence as well as an Attended Noise Survey (4/4/19) were performed by AKRF with Proseada, plaintiff's acoustical consultant in attendance. The summary of the testing showed that the noise levels from Monster Cycle regularly exceeded the New York City Commercial Music Noise Code Sec. 24-231a.2. Moreover, plaintiff has failed to submit any plans or specifications from an architect or contractor for any soundproofing renovation or construction work in unit 1 to abate the noise problem from Monster Cycle pursuant to Section 21(a) of the Lease and paragraph 35 of the Stipulation accompanying plaintiff's lease.

Further, it is disingenuous for plaintiff to contend that he "needs more time" to cure the alleged violations when he denied that any default exists. Since the commencement of the litigation, plaintiff has wholly failed to take an active role in curing the alleged violations to ensure compliance with the lease and any NYC Commercial Music code regulations.

As to motion sequence 002, plaintiff thrusts himself at the mercy of the court because he "will face the imminent loss of the lease-and its valuable business and investment". Here, plaintiff again fails to show that he is able and willing to cure the Lease violations pertaining to the illegal construction in Unit 1 and the illegal use of Monster Cycle spin studio in violation of the building certificate of occupancy and without the special use permit from the NYC Board of Standards and Appeals. In both motion sequences, plaintiff's supporting affidavits are not only similar but contain conclusory self-serving statements without any evidentiary support for the relief he seeks. The fact that plaintiff served a Notice to Cure dated February 25, 2019 on his sub-lessee to cure the Lease violations of operating a cycling studio is completely contradictory to plaintiff's affidavit whereby he acknowledges that the work on unit 1 was done

with his knowledge and that a certificate of occupancy exists. Plaintiff has failed to show a good-faith effort to bring the Monster Cycle use of the premises into compliance with the law as a physical culture establishment under the NYC Zoning Regulations which require a special use permit from the Board of Standards and Appeals. Plaintiff's retention of acoustical consultant Daniel Prosseda to conduct testing over the course of an hour on February 26, 2019 is of no moment. There is nothing in the record to conclude that plaintiff made any effort to rectify any of the violations since the service of the first notice. Based on the foregoing, plaintiff's applications for a *Yellowstone* injunction is denied.

Accordingly, it is hereby **ORDERED** that the orders to show cause under motion sequence 001 and 002 are denied and all previous granted stays are vacated; and it is further

ORDERED, that the parties are directed to appear for a preliminary conference on July 16, 2019 at 9:30 am at 80 Centre Street, Room 278, New York, New York.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 6/3/19



HON. LYNN R. KOTLER, J.S.C.