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| <b>SBA Monarch Towers 1, LLC v Hirakis</b>   |
| 2019 NY Slip Op 32574(U)   |
| July 22, 2019  |
| Supreme Court, Queens County   |
| Docket Number: 708532/2016   |
| Judge: Marguerite A. Grays   |
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Memorandum

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS**  
Justice

IAS PART 4

\_\_\_\_\_  
SBA MONARCH TOWERS 1, LLC, X

Plaintiff(s)

-against-

PETER HIRAKIS,

Defendant(s)

\_\_\_\_\_  
PETER HIRAKIS, X

Third-Party Plaintiff(s)

-against-

PETER LONGO, PE, OMNIPOINT  
COMMUNICATIONS, INC., also known at  
T-MOBILE USA, INC.

Third-Party Defendant(s)

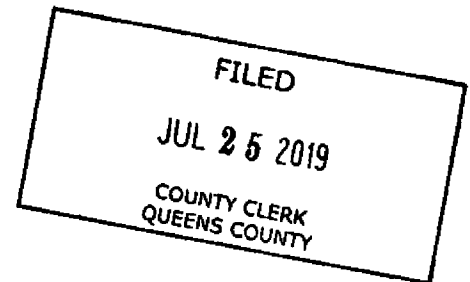
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Plaintiff SBA Monarch Towers I, LLC (SBA) has moved for a Yellowstone injunction prohibiting defendant Peter Hirakis from: (1) declaring the plaintiff in default of a site lease pursuant to a notice dated December 7, 2017; (2) terminating the site lease as of January 16, 2018 pursuant to the notice dated December 7, 2017 and (3) seeking to remove the cellular

telecommunications facility from premises located at 113-12 Springfield Blvd, New York, New York.

### **I. The Allegations of Plaintiff SBA**

Plaintiff SBA alleges the following:

Defendant Peter Hirkakis owns property known as 113-02/12 Springfield Blvd. Queens Village, New York. Plaintiff SBA, a wireless communications company, is the successor tenant under a 2007 site lease between defendant Hirkakis, as landlord, and Omnipoint Communications, Inc., as tenant. Section 3 of the lease permits the use of the demised premises “for the transmission and reception of radio communications signals and for the construction, installation, operation [etc.] of related facilities, including without limitation, tower and base, antennas, microwave dishes, equipment shelters and/or cabinets and related activities.” Section 7(f) of the site lease allows unrestricted access to the leased premises “24 hours a day, 7 days a week” without interference from the defendant for the purpose of altering, replacing, expanding, enhancing, or upgrading the antenna facilities.

Defendant Hirkakis has restricted the plaintiff’s access to the leased premises to only certain hours of the day and has demanded that the plaintiff contact only him to open a locked access gate.

Plaintiff SBA brought the instant action for the purpose of, *inter alia*, obtaining a declaratory judgment that defendant Hirkakis has breached the site lease by prohibiting

unrestricted access to the leased premises, obstructing the access way to the leased premises, and interfering with necessary work on the antenna facilities.

While this action was pending, defendant Hirakis sent plaintiff SBA a "30 Days Notice to Tenant of Termination of Tenancy and Landlord's Intention To Recover Possession." Defendant Hirakis has demanded that SBA build a fence around the leased premises, and plaintiff SBA has denied that it has any obligation to build the fence.

## **II. The Third-Party Complaint**

The third-party complaint brought by defendant/third-party plaintiff Hirakis alleges the following:

Third party defendant Peter Longo, PE and third-party defendant Omnipoint Communications, Inc. "collaborated to install the foundation of the telecommunications antenna without complying with the rules, codes and regulations of the New York City Department of Buildings (DOB) and other governmental agencies. The third-party defendants developed a plan to circumvent the foundation permitting and testing of said antenna." The third-party defendants fraudulently and negligently made representations to the DOB concerning the permit and built the antenna in an illegal and inappropriate manner. The antenna caused damage to the building and property owned by Hirakis, and he had to request his tenants to vacate the building.

### **III. Allegations Made on the Instant Motion**

Defendant Hirakis sent plaintiff SBA another notice to cure dated December 7, 2017. The notice to cure asserts that the plaintiff has violated its lease by, *inter alia*: (1) “constructing the foundation of the antenna without obtaining a proper permit from the NYC Dept of Buildings and/or other governmental agencies” and (2) causing damage to the premises and substantial loss to the landlord. The notice demanded that the tenant cure the violations by January 16, 2018 or face the termination of its lease.

On December 29, 2017, the plaintiff responded to the defendant’s notice by stating, *inter alia*, that it had not violated the lease, but that it was investigating the matter.

### **IV. Relevant Procedural History**

On July 21, 2016, the plaintiff SBA began this action for declaratory, monetary, and permanent injunctive relief because defendant Hirakis had, *inter alia*, impeded upgrade work on cellular telecommunications facilities located on the leased premises. On October 11, 2016, the defendant filed an answer with counterclaims.

Pursuant to a decision dated September 29, 2017, this court granted a motion by the plaintiff for a preliminary injunction prohibiting the defendant from impeding access to the leased premises during the pendency of this action.

Pursuant to a decision dated June 9, 2017, this Court granted a motion by the plaintiff for a Yellowstone injunction.

Pursuant to a decision and order dated February 15, 2018, this Court denied that branch of a motion by defendant Hirakis which sought a preliminary injunction directing plaintiff SBA to immediately remove the unipole.

On January 22, 2019, defendant Hirakis submitted a motion for a judgment declaring that plaintiff SBA's time to comply with the notice to cure dated December 7, 2017 had expired. The Court denied his motion by decision and order dated March 29, 2019 (one paper), which stated: "The defendant's motion is based on the notice to cure dated December 7, 2017 and the alleged failure to cure defaults relating to the foundation of the unipole. However, plaintiff SBA did move for a Yellowstone injunction concerning the December 7, 2017 notice to cure (motion sequence number "11"), but the motion was marked off the calendar due to a misunderstanding by the attorneys. The Court has determined that the motion should be restored to the calendar. Motion sequence number "11" should be decided before the instant motion which is for that reason premature. "

Plaintiff SBA moved for a preliminary injunction, *inter alia*, prohibiting defendant Peter Hirakis from obstructing its application to the New York City Department of Buildings (DOB) whose purpose is to cure any alleged permit defects concerning SBA's wireless facilities located on the defendant's premises. Pursuant to a memorandum dated June 6, 2019, this Court granted the motion.

## V. Discussion

"The purpose of a Yellowstone injunction is to enable a tenant confronted by a notice of default, a notice to cure, or a threat of termination of the lease to obtain a stay tolling the running of the cure period so that, after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold \*\*\*" (*M.B.S. Love Unlimited, Inc. v. Jaclyn Realty Associates*, 215 AD2d 537, 538 [1995]; *see, Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates*, 93 NY2d 508 [1999]; *JT Queens Carwash, Inc. v. 88-16 N.-Blvd., LLC*, 101 AD3d 1089 [2012]; *Trump on the Ocean, LLC v. Ash*, 81 AD3d 713[2011].) Having such a purpose, a Yellowstone injunction may issue even though the applicant has not made the usual tripartite showing for obtaining provisional relief (*see, Post v. 120 East End Ave. Corp.*, 62 NY2d 19 [1984]; *Trump on the Ocean, LLC v. Ash, supra*; *225 East 36th Street Garage Corp. v. 221 East 36th Owners Corp.*, 211 AD2d 420 [1995].) Whatever the merits of the case, Courts have routinely granted Yellowstone injunctions, and the plaintiff tenant is not required to show a probability of success on the merits (*see, Goldcrest Realty Co. v. 61 Bronx River Road Owners, Inc.*, 83 AD3d 129 [2011]). A Yellowstone injunction is intended only to preserve the status quo, and it may be granted without consideration of the merits of the case (*see, 440 East 62nd Street Owners Associates, L.P. v. 440 East 62nd St. Owners Corp.*, 217 AD2d 425 [1995]; *144 East 40th Street Leasing Corp. v. Schneider*, 125 AD2d 195 [1986]; *Ameurasia International Corp., v. Finch Realty Co.*, 90 AD2d 760 [1982]).

“A tenant 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 \*\*\*” (*Trump on the Ocean, LLC v. Ash, supra*, 716; *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates, supra*; *JT Queens Carwash, Inc. v. 88-16 N.-Blvd., LLC, supra*).

In the case at bar, the only issue arising under these requirements is whether plaintiff SBA has the ability to cure the alleged default concerning the alleged improper construction of the antenna. Jose A. Velasquez, an engineer retained by defendant Hirakis, asserts the following: “ Plaintiff will not be able to cure the defect of not having a permit for the following reasons: The foundation should be constructed at a minimum distance of 10.00 ft between the building and the foundation/unipole. \*\*\* Plaintiff will not be able to move the foundation 6 more feet away from the building \*\*\* because the leased premises may not be enough to accommodate such dimensions as required by the building code \*\*\*.” On the other hand, this Court’s memorandum dated June 6, 2019 states: “According to Linda Montemarano, the owner of Construction Permit Services Corp. (CPS), which provides services to the telecommunications industry, including those related to the permitting process of DOB, on April 26, 2018 she and Peter Longo met with an examiner from DOB and ‘promptly resolved items numbers 1 and 5 on the Notice Letter.’ Montemarano further

alleges that based on her ‘experience and knowledge of the Department of Buildings, the permitting defect alleged by the defendant and raised in the audit process concerning the foundation is readily curable.’ She intended to file applications with DOB to ‘validate the existing foundation and to reinstate the Permit.’”

Plaintiff SBA has made an adequate showing of its entitlement to a Yellowstone injunction (*see, Chai & Tantrakoon, Inc. v. Royal Realty Corp.*, 246 AD2d 398 [1998]). Although the conflicting affidavits of experts create issues of fact (*see, Hendricks v. Transcare New York, Inc.*, 158 AD3d 477 [2018]), the existence of factual issues do not in themselves preclude the issuance of a preliminary injunction (*see, CPLR 6312[c]; Egan v. New York Care Plus Ins. Co.*, 266 AD2d 600 [1999]). A Yellowstone injunction is intended only to preserve the status quo, and it may be granted without consideration of the merits of the case (*see, 440 East 62nd Street Owners Associates, L.P. v. 440 East 62nd St. Owners Corp., supra*).

The plaintiff’s request for a preliminary injunction is proper insofar as it seeks to prohibit the defendant from declaring the plaintiff in default of the site lease pursuant to the written notice dated December 7, 2017 and terminating the site lease pursuant to that written notice. However, the plaintiff’s request for a preliminary injunction is too broad and vague insofar as it is an attempt to prohibit the defendant “from seeking to remove the cellular telecommunications facility from the premises.”

Accordingly, the motion is granted to the extent that it seeks to prohibit the defendant from declaring the plaintiff in default of the site lease pursuant to the written notice dated December 7, 2017 and terminating the site lease pursuant to that written notice. The motion is otherwise denied. The parties may submit affidavits concerning the proper amount of the undertaking at the time of the settlement of the Order.

Settle Order.

Dated: **JUL 22 2019**



MARGUERITE A. GRAYS  
J.S.C.

FILED  
JUL 25 2019  
COUNTY CLERK  
QUEENS COUNTY