# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. ANDREW BORROK **PART** IAS MOTION 53EFM

*Justice*

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BOOSTON LLC

Plaintiff,

- v -

35 WEST REALTY CO., LLC,

Defendant.

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**INDEX NO.** 654308/2019

**MOTION DATE** 07/30/2019

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 19, 20, 21, 22, 23, 24, 25, 26, 29

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

Upon the foregoing documents and for the reasons set forth on the record, the motion for a *Yellowstone* injunction is denied and the TRO entered on July 30, 2019 is hereby vacated.

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 to that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture" (*Graubard Mollen Horowitz Pomeanz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]). To obtain a Yellowstone injunction a tenant must demonstrate that: "(1) it holds a commercial lease; (2) it received from the notice 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 to 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 [1st Dept 1995]).

Reference is made to a Standard Form of Store Lease (the **Lease**), dated October 10, 2000 for a building known as 35 West 57th Street. Reference is made to a Notice to Cure (the Notice) dated July 10, 2019, issued by 35 West Realty Co., LLC (the **Landlord**) to Booston LLC (the **Tenant**) that, *inter alia,* Tenant is in violation of Article 9 of the Rider to its Lease, captioned "Insurance," which provides in pertinent part:

> Tenant shall furnish Landlord with and continue to keep in effect the following insurance coverage on the Demised Premises and any future improvements by recognized insurance carriers licensed to do business in New York and in all cases naming Landlord.
> (a) Public liability coverage against claims for bodily injury or death in amount of $2,000,000.00 in a single limit or under an original policy with an umbrella....

(NYSCEF Doc. No. 6)

According to the Notice,

> Tenant has violated and continues to violate substantial obligations of Tenant's tenancy at the Premises in that in violation of Article 9 of the Rider to the Lease, Tenant has failed to furnish Landlord with and continue to keep in effect sufficient insurance coverage on the Premises in accordance with the requirements of that section. Specifically, in violation of Article 9 of the Rider to the Lease, Tenant has failed to (1) furnish Landlord with and keep in effect public liability coverage against claims for bodily injury or death in the amount of $2,000,000 in a single limit or under an original policy with an umbrella, but has instead furnished Landlord with an insurance certificate showing such coverage only in the amount of $1,000,000 in a single limit, and (2) name Landlord as a named insured in Tenant's insurance coverage on the Premises.

(*id.*).

The Notice further provides that the Tenant must cure this breach by:

> providing Landlord with sufficient proof that Tenant has consistently maintained the insurance coverage required under Article 9 of the Rider to the Lease, and that Tenant has properly named Landlord as a named insured on the respective policies that were in place and maintained, by furnishing Landlord with certificates of insurance and copies of the actual policies of insurance for the

> years since Landlord acquired title to the Building; to wit, the years 2006 through 2019, which certificates and/or other documentation should evidence Tenant's full compliance with the coverage requirements of Article 9 of the Rider to the Lease.

(*id.*).

The Tenant argues that to the extent that it was ever in breach of the "Insurance" provision in the Lease, the Landlord's claims with respect to this breach are waived because the Tenant has delivered to the Landlord copies of its insurance certificates for more than five years without there being any objection from the Landlord as to the insurance coverage, and the Landlord accepted rent payments from the Tenant throughout. This argument is unavailing. Paragraph 24 of the Lease, entitled "No Waiver" provides:

> 24. The failure of Owner to seek redress for violation of, or to insist upon the strict performance of any covenant or condition of this lease or any of the Rules or Regulations set forth or hereafter adopted by Owner, shall not prevent a subsequent act which would have originally constituted a violation from having all the force and effect of an original violation. The receipt of owner of rent with knowledge of the breach of any covenant of this lease shall not be deemed a waiver of such breach and no provision of this lease shall be deemed to have been waived by Owner unless such waiver is signed by Owner…

The Tenant's waiver argument is, thus, clearly barred by the terms of the parties' Lease (*Excel Graphics Tech. v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65, 69-70 [1st Dept 2003] [vacating and denying *Yellowstone* injunction where "plaintiff's factual arguments in support of its waiver claim is negated by the express language of the lease"]).

In addition, putting aside the No Waiver clause that dictates the result herein, "[a] necessary lynchpin of a *Yellowstone* injunction is that the claimed default is capable of cure" (*Bliss World LLC v 10 West 57th Street Realty LLC*, 170 AD3d 401, 401 [1st Dept 2019]). If "the claimed

default is not capable of cure, there is no basis for a *Yellowstone* injunction" (*id.*). The First Department has held that failure to procure insurance cannot be cured where the proposed cure does not involve "any retroactive change in coverage, which means that the alleged defaults raised by the landlord are not susceptible to cure" and, therefore, there is no basis for a *Yellowstone* injunction (*id.*; *117-119 Leasing Corp. v Reliable Wool Stock LLC*, 139 AD3d 420 [1st Dept 2016]). The rationale for the First Department's decisions is simple: a deficiency in past insurance coverage "does not protect the landlord against the unknown universe of any claims arising during the period of no insurance coverage" (*Kyung Sik Kim v Idylwood, NY, LLC*, 66 AD3d 528, 529 [1st Dept 2009]. This rationale squarely applies here and as there is no means for the Tenant to obtain retroactive insurance coverage, the Yellowstone injunction must be denied.

To the extent that the Tenant argues that the Landlord's concerns are addressed by the Tenant's posting of a $1 million indemnity bond and that such bond "cures" any alleged insurance coverage shortfall, the Tenant is incorrect (*see* Perderson Aff., NYSCEF Doc. No. 29). First, the Lease does not provide for alternatives to providing the requested insurance coverage set forth in the Lease. To wit, the Lease does not indicate that in lieu of the provided for insurance, the Tenant can substitute a bond. Second, even if it did, the Landlord maintains that $2,000,000 of coverage in a "single limit" means $2,000,000 "per occurrence." A $1,000,000 bond (on top of Tenant's $1,000,000 coverage for each occurrence) would not provide the coverage that Landlord claims is required, *i.e.,* "in the amount of $2,000,000 in a single limit" (Notice, NYSCEF Doc. No. 6). For the avoidance of doubt, inasmuch as the Tenant also argues that it

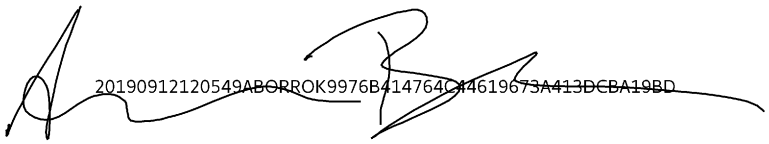
never breached the Lease because it has always had a $2,000,000 policy "in the aggregate," this is simply not a basis for a *Yellowstone* injunction, which requires a default capable of a cure.

Accordingly, it is

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that the TRO dated July 30, 2019 is hereby vacated; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Part 53, 60 Centre Street, Room 238, New York, New York, on October 3, 2019 at 11:30 A.M.




9/12/2019
DATE

ANDREW BORROK, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | X | DENIED | | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |