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| Ted Baker Ltd. v Wooster St., LLC |
| 2019 NY Slip Op 34029(U) |
| September 16, 2019 |
| Supreme Court, New York County |
| Docket Number: 153077/2020 |
| Judge: Lucy Billings |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46

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TED BAKER LIMITED,

Index No. 153077/2020

Plaintiff

- against -

DECISION AND ORDER

WOOSTER STREET, LLC d/b/a JORDAN
WOOSTER STREET ASSOCIATES, L.L.C.,

Defendant

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LUCY BILLINGS, J.S.C.:

Plaintiff, a luxury clothing retail business, holds a commercial lease for the ground and cellar floors at 115-121 Wooster Street, New York County, owned by defendant. Plaintiff has moved for a Yellowstone injunction tolling plaintiff's time to cure the defaults under its lease claimed by defendant in notices to cure and restraining defendant, based on the claimed defaults, from terminating the lease, interfering with plaintiff's possession of the leased premises, or drawing on plaintiff's letter of credit provided as a security deposit. First Nat'l Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 21 N.Y.2d 630 (1968). On June 5, 2020, the court temporarily enjoined the running plaintiff's time to cure the claimed defaults and enjoined defendant, based on the claimed defaults, from terminating the lease, interfering with plaintiff's possession of the leased premises, or drawing on plaintiff's letter of credit unless plaintiff failed to pay rent for June 2020. C.P.L.R. §§ 6301, 6313(a). The June 2020 rent constituted

an undertaking for the temporary injunction. C.P.L.R. § 6313(c). The court now grants plaintiff's motion for a preliminary injunction and fixes an undertaking. C.P.L.R. §§ 6301, 6312(a) and (b).

I. THE PURPOSE OF THE INJUNCTION

Defendant's notice to cure dated March 11, 2020, claims that plaintiff has failed to repair a condition that, according to plaintiff, has caused 45 incidents of sewage overflow into the leased premises and rendered part of the premises unusable. Plaintiff contends that the lease obligates defendant to repair this condition. Defendant's notices to cure dated April 6 and May 7, 2020, claim that plaintiff failed to pay rent for April and May 2020.

The limited purpose of a Yellowstone injunction is to toll plaintiff tenant's time to cure a default claimed by defendant landlord under the parties' lease, to allow litigation and determination of whether the tenant is required to cure a default. Graubard Mollen Horowitz Pomerantz & Shapiro v. 600 Third Ave. Assoc., 93 N.Y.2d 508, 514 (1999); Artcorp Inc. v. Citirich Realty Corp., 124 A.D.3d 545, 546 (1st Dep't 2015); Village Ctr. for Care v. Sligo Realty & Serv. Corp., 95 A.D.3d 219, 222 (1st Dep't 2012); Boi To Go, Inc. v. Second 800 No. 2 LLC, 58 A.D.3d 482, 482 (2009). Here, there are substantial questions whether plaintiff tenant or defendant landlord is required to repair the condition that has caused the sewage overflow and, if the repair is defendant's obligation, whether

plaintiff is entitled to an abatement of rent proportionate to the part of the premises rendered unusable until defendant repairs the condition. The purpose of a Yellowstone injunction is to litigate whether plaintiff or defendant is required to cure the condition and the extent to which plaintiff is relieved of its obligation to pay rent. Bliss World LLC v. 10 W. 57th St. Realty LLC, 170 A.D.3d 401, 402 (1st Dep't 2019); Artcorp Inc. v. Citirich Realty Corp., 124 A.D.3d at 546; Boi To Go, Inc. v. Second 800 No. 2 LLC, 58 A.D.3d at 482; TSI W. 14, Inc. v. Samson Assoc., LLC, 8 A.D.3d 51, 53 (1st Dep't 2004).

Plaintiff demonstrates its entitlement to a Yellowstone injunction by showing that plaintiff holds a lease for commercial premises, received notices to cure from its landlord, requested the injunction sought before defendant landlord acted to terminate the lease, and is willing and able to cure the defaults if the court ultimately determines that plaintiff has defaulted. Graubard Mollen Horowitz Pomerantz & Shapiro v. 600 Third Ave. Assoc., 93 N.Y.2d at 514; Boi To Go, Inc. v. Second 800 No. 2 LLC, 58 A.D.3d at 482. Although plaintiff's failure to cure within the cure periods applicable to each default may have resulted in a default under the lease, defendant admits that it took no action to terminate the lease and in fact never intended to do so. Even were plaintiff required to seek a toll of the cure period before a default rather than before termination of the lease, and even if the Governor's Executive Order No. 202.8 issued March 20, 2020, did not toll the cure periods, the Chief

Administrative Judge's Administrative Order issued March 22, 2020, barred plaintiff from seeking an injunction until plaintiff did so May 25, 2020.

When granting an preliminary injunction, the court gauges the amount of the undertaking plaintiff is to provide according to its potential liability if the preliminary injunction granted later proves to have been unwarranted. C.P.L.R. § 6312(b); Graubard Mollen Horowitz Pomerantz & Shapiro v. 600 Third Ave. Assoc., 93 N.Y.2d at 515; 1414 Holdings, LLC v. BMS-PSO, LLC, 116 A.D.3d 641, 643-44 (1st Dep't 2014); Witham v. vFinance Invs., Inc., 52 A.D.3d 403, 404 (1st Dep't 2008). That liability will depend on resolution of the following issues.

II. THE CAUSE OF THE OVERFLOW

The lease at §§ 6.01 and 6.02 requires defendant to maintain and repair the building's plumbing system up to where the system connects to the leased premises and requires plaintiff to repair any parts of the plumbing system within the premises. Plaintiff claims that since October 2016, it repeatedly has notified defendant of the repeated instances of sewage overflow and consequent flooding in the bathroom of plaintiff's store on the ground floor, used by plaintiff's employees and customers, and in the bathroom on the cellar floor, used by plaintiff's employees as an office, a pantry, and storage space. Defendant has never assessed the condition to determine whether its cause lies in the building plumbing system outside the leased premises or within the premises, nor remedied the condition. Plaintiff has incurred

the expenses of cleaning up the flooding and repairing the damage caused by the flooding.

In November 2019, plaintiff conducted its own assessment of the condition, which concluded that its cause lies in the building plumbing system outside the leased premises: specifically, the pitch of the piping underneath the cellar's floor slab. A prior inspection found that the condition had caused mold growth in both bathrooms, remediation of which would require removing flooring, cleaning structural components, clearance testing, and reconstruction after removal of the mold. Plaintiff notified defendant of both these assessments.

Only at the end of February 2020 did defendant propose to plaintiff to share the expense of an independent plumber to determine the cause of the overflow. Albeit not precisely consistent with the lease's allocation of obligations, defendant proposed that, if the independent plumber found plaintiff's plumbing alterations within the leased premises in compliance the New York City Plumbing Code, defendant would bear the costs of correcting the cause of the overflow that the independent plumber identified and restoring the damaged areas. If the independent plumber found plaintiff's plumbing alterations in violation of the New York City Plumbing Code, plaintiff would bear the costs of correction and restoration. Plaintiff rejected the proposal because it did not address plaintiff's entitlement to a rent abatement or reimbursement for its prior repairs in the event that the cause of the overflow was outside the leased premises

and unrelated to plaintiff's alterations.

Defendant's notice to cure dated March 11, 2020, nonetheless notified plaintiff that, if plaintiff did not repair the condition within 30 days, defendant would invoke its right under §§ 15.01(A)(ii) and 15.02(A) of the lease to perform the repairs and charge them to plaintiff. Defendant never explains why it never invoked that right between October 2016 and March 2020, despite its receipt of repeated notices of the condition, or, if it claimed plaintiff was required to perform the repairs, but they affected the building outside the leased premises, its comparable right under § 6.04 of the lease. Aff. of Fiona Zeman Ex. A § 6.04; Aff. of Billy Schur Ex. A § 6.04. It attributes its failure to act since April 10, 2020, to the onset of the coronavirus pandemic.

III. THE PAYMENT OF RENT

The lease at §§ 34.01 and 34.03 provides that, in the event of the defaults in payment of rent as claimed in defendant's notices to cure dated April 6 and May 7, 2020, defendant may draw on plaintiff's \$999,873.90 letter of credit, provided as a security deposit, to the extent required to pay rent past due. Defendant thus cured these defaults by drawing \$164,060.94 on the letter of credit April 24, 2020, and again May 21, 2020. Therefore these defaults and the April and May 2020 notices to cure are moot. Defendant's remedy now would be to declare a new default for plaintiff's failure to maintain the letter of credit at \$999,873.90.

Although § 3.01 of the lease requires plaintiff to pay rent without any abatement, reduction, deduction, setoff, counterclaim, or defense, that requirement is qualified by the provision, "except if and to the extent expressly provided for otherwise elsewhere in this lease." Zeman Aff. Ex. A § 3.01; Schur Aff. Ex. A § 3.01. Section 9.01 of the lease provides that, if an "insured casualty" renders any material part of the leased premises untenable, the rent proportionate to the untenable area "shall be abated . . . from the date of such damage to the date when such damage shall have been repaired" by the landlord. Zeman Aff. Ex. A § 9.01; Schur Aff. Ex. A § 9.01. Plaintiff maintains that the flooding emanating from a source outside the premises constitutes a "casualty," which is undefined, under the lease, 45 Broadway Owner LLC v. NYSA-ILA Pension Trust Fund, 107 A.D.3d 629, 630 (1st Dep't 2013), but nothing in the record of this motion indicates this flooding is an "insured casualty." If so, however, plaintiff raises substantial issues regarding the extent of the area rendered untenable and the length of time that area has been untenable that would entitle plaintiff to a partial rent abatement since October 2016.

Defendant accuses plaintiff of using its complaints about the plumbing as a pretext to obtain rent relief rather than to resolve the plumbing problem. The unsanitary conditions created by the plumbing problem, however, which defendant does not deny, entirely legitimize plaintiff's desire to obtain a rent abatement

as well as to remedy the problem.

IV. THE INJUNCTION AND THE ACCOMPANYING UNDERTAKING

Since plaintiff has demonstrated its entitlement to a Yellowstone injunction, the court preliminarily enjoins the running plaintiff's time to cure the defaults in defendant's notices to cure dated March 11, April 6, and May 7, 2020. The court also enjoins defendant, based on the claimed defaults, from terminating the lease and interfering with plaintiff's possession of the leased premises, except to correct the sewage overflow and restore the damaged areas. Finally, the court enjoins defendant, based on the claimed defaults, from drawing further on plaintiff's letter of credit, but conditions this preliminary injunction on plaintiff providing the following undertaking. C.P.L.R. §§ 6301, 6312(a) and (b).

Since plaintiff's nonpayment of rent for June 2020, ordered as a condition of the temporary injunction dated June 5, 2020, necessitated defendant's further reduction of plaintiff's security deposit, plaintiff shall replenish that amount, the \$164,060.94 in rent due for June 2020, by payment of that amount directly to defendant within five days after entry of this order. Since only in the last month has defendant diligently proceeded to perform the repairs that it was always entitled to perform, even if chargeable to plaintiff, plaintiff either may pay defendant directly or shall deposit with the Clerk of the Court the rent now past due for July, August, and September 2020 within 10 days after entry of this order. Plaintiff shall pay future

rent when due through one of these two means until defendant has repaired the condition causing the sewage overflow into the leased premises and restored the damaged areas of the premises to a sanitary and safe condition, free of any mold capable of causing adverse health effects, unless the parties agree that plaintiff will perform the repairs and restoration. If the parties agree that plaintiff will perform the repairs and restoration, they also will agree on the means and extent of plaintiff's payment of rent during the repairs and restoration. All repairs and restoration shall be carried out in compliance with all laws.

Unless the parties agree that plaintiff will perform the repairs and restoration, plaintiff shall not unreasonably interfere with defendant performing the repairs and restoration during mutually agreed upon hours. If plaintiff does unreasonably interfere, as well as when defendant has completed the repairs and restoration, the option to deposit rent with the Clerk of the Court will cease.

Whether defendant or plaintiff is responsible for the costs of these repairs and the accompanying restoration of the leased premises remains to be determined. This preliminary injunction and the undertaking ordered shall remain in effect until either party seeks further relief and until further order.

DATED: September 16, 2019

Lucy Billings

LUCY BILLINGS, J.S.C.

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LUCY BILLINGS
J.S.C