

Bakerhood Realty Inc. v A&L Gaudio Realty, Inc.

2020 NY Slip Op 30359(U)

February 7, 2020

Supreme Court, New York County

Docket Number: 162147/2019

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 162147/2019

BAKERHOOD REALTY INC.,

Plaintiff,

MOTION SEQ. NO. 001

- v -

A&L GAUDIO REALTY, INC.,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

In this action seeking, inter alia, injunctive and declaratory relief, plaintiff/tenant Bakerhood Realty Inc. moves, by order to show cause (“OSC”), against defendant/landlord A&L Gaudio Realty, Inc. for a *Yellowstone* injunction (*see First National Stores, Inc. v Yellowstone Shopping Center, Inc.*, 21 NY2d 630 [1968]) staying termination of its lease and enjoining defendant from evicting it from the premises.

FACTUAL AND PROCEDURAL BACKGROUND:

Pursuant to a 10-year commercial lease dated October 23, 2013, plaintiff rented from defendant certain premises located at 1666 1st Avenue, New York, New York (a/k/a 400 East 87th Street) which were to be used as an ice cream parlor. Doc. 5. The lease required, inter alia, that plaintiff: 1) operate its business at least 5 days per week during the term of the lease (Doc. 5 at par. 54[A]; 2) operate the business in a “dignified and responsible manner” (Doc. 5 at par. 54[B]); 3) “maintain the premises in a clean and attractive manner consistent with the upkeep and

appearance of a ‘first class’ building” (Doc. 5 at par. 54[C]); 4) maintain general liability and property damage insurance (Doc. 5 at par. 57); 5) not allow anyone else to use the premises without prior written consent of defendant (Doc. 5 at pars. 11, 44[A], [B]); 6) provide and pay for extermination services at the premises (Doc. 5 at par. 61); 7) “shall not permit the accumulation of rubbish, trash, garbage and other refuse in and around the demised premises” (Doc. 5, at par. 53); and 8) heat the premises. Doc. 5 at par. 51(B).

Paragraph 17(1) of the lease provided that:

If [plaintiff] [t]enant defaults in fulfilling any of the covenants of this lease...upon [defendant] [o]wner serving a written fifteen (15) days notice upon [plaintiff] [t]enant specifying the nature of said default and upon the expiration of said fifteen (15) days, if [t]enant shall have failed to comply with or remedy such default... then [defendant] [o]wner may serve a written live (5) days notice of cancellation of this lease upon [plaintiff] tenant, and upon the expiration of said five (5) days, this lease and the term thereunder shall end and expire as fully and completely as if the expiration of such five (5) day period were the day herein definitely fixed for the end and expiration of this [l]ease and the terms thereof...

Doc. 5 at par. 17(1).

Paragraph 58 of the lease required that any notices to plaintiff from defendant be delivered in person or sent by registered or certified mail, return receipt requested, or by Federal Express or another “nationally recognized overnight mail courier service”, to 1661 1st Avenue, New York, New York 10028. Doc. 5 at par. 58. That paragraph also required that any notices mailed to plaintiff were to be sent to Bakerhood Realty at 1666 1st Avenue, New York, New York 10028.

Doc. 5 at par. 58.

On November 12, 2019, defendant purportedly sent plaintiff a notice of default by certified mail, return receipt requested, advising plaintiff that it was in violation of the foregoing provisions of the lease and that it had until December 3, 2019 to cure the same. Doc. 7.¹

On December 4, 2019, defendant purportedly sent a notice of cancellation to plaintiff at 1666 1st Avenue, New York, New York by certified mail, return receipt requested. Doc. 6. The notice advised plaintiff that, since it failed to cure the lease violations claimed in the November 12, 2019 notice of default by December 3, 2019, the lease would be terminated on December 20, 2019. Doc. 6. The only proof of mailing of the notice of cancellation annexed to the motion reflects that a letter, postmarked December 5, 2019, was sent by regular mail to plaintiff's principal at 252 East 52nd Street, # 1B, New York, New York 11030. Doc. 8.

On December 10, 2019, plaintiff's principal found a copy of the notice of cancellation on the floor of the demised premises. Doc. 3 at par. 6.

Plaintiff then commenced the captioned action on December 16, 2019, filing a summons with notice indicating that it sought declaratory and equitable relief, including a *Yellowstone* injunction, as well as possible money damages and attorneys' fees. Doc. 1. Plaintiff simultaneously filed the instant OSC seeking a *Yellowstone* injunction and a temporary restraining order ("TRO") staying its time to cure the alleged violations and preventing defendant from taking any action adverse to plaintiff's leasehold pending the hearing of the application. Doc. 2. On January 15, 2020, this Court signed the OSC and issued the requested TRO Doc. 13. By so-ordered stipulation entered February 5, 2020, the TRO was extended until the determination of the instant motion. Doc. 44.

¹ The notice of default provided that the lease violations had to be cured on or before December 2, 2019 and that, if they were not cured by December 3, 2019, defendant "may serve [plaintiff]" with a notice of cancellation of the lease. Doc. 7.

In support of the OSC, plaintiff argues, inter alia, that since the notice of default and the notice of cancellation were not served in accordance with the terms of the lease, i.e., personal service or registered or certified mail, return receipt requested, they are of no force and effect. Additionally, plaintiff claims that it has established its entitlement to a *Yellowstone* injunction preventing defendant from taking any action to terminate its lease.

Defendant opposes the OSC on the ground that it is untimely, having been made after the December 3, 2019 expiration of plaintiff's cure period. It further asserts that the notice of default and the notice of cancellation were properly served by certified mail, return receipt requested. Additionally, maintains defendant, plaintiff has failed to demonstrate, or even allege, that it is willing to cure its default.

In reply, plaintiff argues, inter alia, that its time to cure never began to run since it was never served with the notice of default, and that the notice of cancellation was improperly served.

LEGAL CONCLUSIONS:

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 so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture. The party 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" (*225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421).

These standards reflect and reinforce the limited purpose of a *Yellowstone* injunction: to stop the running of the applicable cure period (*Post v 120 E. End Ave. Corp.*, [62 NY2d] *supra*, at 25).

Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc., 93 NY2d 508, 514 (1999).

Defendant's contention that the notice of default and notice of cancellation were properly served is without merit. It is well settled that a landlord and tenant may agree in a lease to the specific manner in which notices must be served, and such terms are generally enforceable. *See Chumley's Bar and Rest. Corp. v Bedford Ct. Assoc.*, 174 AD2d 398, 400 (1st Dept 1991). Although courts have waived strict adherence to notice requirements in a lease where the rights of the party to be served were not adversely affected by the technical noncompliance with the lease terms (*see, e.g., Rower v West Chamson Corp.*, 210 AD2d 7 [1st Dept 1994][under circumstances of the case, use of certified mail, instead of registered mail, as required by the lease, did not invalidate service of notices), the facts of this case do not warrant such an exception. Defendant has provided no proof that the notice of default was ever served on plaintiff. Although defendant's counsel claims that he "caused the [d]efault [n]otice to be served, by certified mail, return receipt requested," he does not represent that he personally served it, and neither defendant nor its attorney submits an affidavit of service or proof of certified or registered mailing. As a result, plaintiff did not learn about the December 3, 2019 deadline to cure until December 10, 2019, when it discovered a copy of the notice of cancellation on the floor of the demised premises, by which time it was too late to cure its alleged defaults. Given that defendant's purported notice of default and notice of cancellation, dated November 12 and December 4, 2019, respectively, were never properly served, this Court deems them to be of no force and effect.

Where, as here, a notice of default was never served, a *Yellowstone* injunction is inapplicable since plaintiff did not need to stay its time to cure alleged defaults about which it had

no knowledge. See *Queensboro Parking Corp. v Phipps Houses*, 2015 NY Slip Op 32138(U) (Sup Ct Queens County 2015). As noted above, plaintiff had no knowledge of the notice of default until it found the notice of cancellation at the demised premises on December 10, 2019, after the expiration of the December 3, 2019 deadline for curing any defaults under the lease. Thus, the motion for *Yellowstone* relief must be denied.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff is denied; and it is further


ORDERED that defendant’s purported notice to cure and notice of cancellation, dated November 12 and December 4, 2019, respectively, are stricken on the ground that they were not served in accordance with the terms of the lease between the parties; and it is further

ORDERED that all stays are vacated; and it is further

ORDERED that the parties are to appear for a status conference on March 26, 2020 at 2:30 p.m. at 80 Centre Street, Room 280; and it is further

ORDERED that this constitutes the decision and order of this Court.

2/7/2020
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

