

**Gap, Inc. v 44-45 Broadway Leasing Co. LLC**

2020 NY Slip Op 32403(U)

July 21, 2020

Supreme Court, New York County

Docket Number: 652549/2020

Judge: Debra A. James

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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. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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INDEX NO. 652549/2020

THE GAP, INC. and OLD NAVY, LLC,

MOTION DATE 07/21/2020

Plaintiffs,

MOTION SEQ. NO. 001

- v -

44-45 BROADWAY LEASING CO. LLC,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for INJUNCTION/YELLOWSTONE

ORDER

Upon the foregoing documents, it is

ORDERED that the plaintiffs' motion for a Yellowstone injunction is GRANTED, retroactive to June 25, 2020, and the cure periods are hereby tolled pending a determination of whether the plaintiffs are in default under the Lease dated June 24, 2015 and the Lease dated June 24, 2015, respectively, and pursuant to defendant's Notices of Default dated June 16, 2020; and it is further

ORDERED that defendant is, effective June 25, 2020, preliminarily enjoined from terminating plaintiffs' leases pending the outcome of this action and a declaration determining the rights, remedies and liabilities of the parties; and it is further

ORDERED that the Yellowstone injunction granted above is hereby conditioned upon an undertaking in the form of plaintiffs' payment of use and occupancy for the premises in the amount of \$1,434,470, based upon the monthly fixed rent under the Lease dated June 24, 2015 between plaintiff The Gap, Inc. and defendant, and in the amount of \$1,519,263, based upon the monthly fixed rent under the Lease dated June 24, 2015 between Old Navy, LLC and the defendant, for a total amount of use and occupancy in the sum of \$2,953,733, and at the time such rent due under each Lease, except as to use and occupancy for July 2020, which is due immediately; and it is further

ORDERED that plaintiffs shall post a bond in the amount of \$5,842,531 with the Clerk of New York County to secure the payment of rent arrears allegedly owed by plaintiffs to defendant for May and June 2020; and it is further

ORDERED that counsel are directed to file with IAS Part 59 ([59nyef@nycourts.gov](mailto:59nyef@nycourts.gov)) the proposed discovery preliminary conference order no later than August 18, 2020, which order shall also propose a date for a discovery compliance conference.

DECISION

In this declaratory judgment action seeking an order adjudicating plaintiffs' rights under two certain commercial leases, plaintiffs seek a Yellowstone injunction pursuant to First National Stores v Yellowstone Shopping Center, 21 NY2d 630 (1968).

Plaintiffs have demonstrated that (1) each holds a commercial lease; (2) each received from the landlord a notice to cure; (3) each requested injunction relief before the termination of the lease; and (4) each is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises. See Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Avenue Associates, 93 NY2d 508, 514 (1999).

Specifically, with respect to the issue whether each commercial lease remains extant, defendant's argument that plaintiffs no longer hold a commercial lease because, in this action, they seek a declaration that each lease has terminated is unpersuasive. Plaintiffs' counsel is correct that as there has been no adjudication of such claim and as they have pled, in the alternative, that they are entitled to a rent abatement under each such lease, plaintiffs have demonstrated that they hold the two commercial leases at this time has been established.

Defendant next argues that plaintiffs did not request injunctive relief before termination of each leasehold under the default notice, as the Order to Show Cause (OSC) dated June 25, 2020 never took effect as plaintiffs did not comply with the directives for service of such OSC. Such OSC required that plaintiffs personally deliver the OSC, summons and complaint, and supporting papers to defendant, and defendant argues that plaintiffs' service upon the Secretary of State does not establish such service. This court disagrees. Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co., Inc., 67 NY2d 138 (1980) is not to the contrary, as that decision examined the distinction between service upon a corporation through delivery to the Secretary of State under the Business Corporation Law § 306 and service upon an agent designated under CPLR 318, for the purposes of determining entitlement to relief from a default under CPLR 317. Thus, the issue in Eugene Di Lorenzo, supra, was a question of statutory construction, so not controlling on this court's intention with respect to the method of service under the OSC. Moreover, as argued by plaintiffs, Limited Liability Company Law § 301(b) required defendant to designate the Secretary of State as its agent for service of process, and thus delivery to that agent met the OSC's directive.

This court also concurs with plaintiffs' counsel that "nail and mail" service constitutes personal service under CPLR

308(4), and defendant raises no issue of fact with respect to the process server's statements of due diligence, having searched for but unable to find defendant's managing member or any person of suitable age and discretion at either his residence or defendant's office building. Thus, the facts at bar are distinguishable from those before the court in Norlee Wholesale Corp., Inc. v 4111 Hempstead Turnpike Corp., 138 AD2d 466, 468 (2d Dept. 1988), where the process server did not state, "with due diligence, that it was impossible to serve [the] party personally or to deliver the papers to a person of suitable age and discretion at the party's business dwelling or abode with a follow-up mailing".

Turning to the question of an appropriate undertaking, in Kuo Po Trading Co., Inc. v Tsung Tsin Assn, Inc., 273 AD2d 11, where the plaintiff tenant demonstrated that "defendant [was] adequately protected by the value of the building improvements installed by plaintiff at its own expense", the appeals court upheld the trial court's finding of no necessity for a bond to pay the alleged rent arrearals should defendant ultimately prevail. Here, plaintiffs offer no evidence of any such security, and therefore an undertaking is warranted.

However, as set forth in the affidavit of plaintiffs' senior director of real estate, the global pandemic has had a devastating impact on the retail industry, arising from the

governmental closing of malls in New York City, from March 22 with no date certain for reopening. Considering these extraordinary circumstances, in the exercise of discretion, the court sets use and occupancy and the undertaking for May and June 2020 rent arrears based upon the monthly fixed rent under the Lease, as of June 2020, each reduced by about ten percent (10%).

7/21/2020  
DATE

*Debra A. James*  
DEBRA A. JAMES, J.S.C.

CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  DENIED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE