

Rame, LLC v Metropolitan Realty Mgt., Inc.
2020 NY Slip Op 33538(U)
October 27, 2020
Supreme Court, New York County
Docket Number: 157438/2020
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. BARBARA JAFFE</u></p> <p style="text-align: right; margin-right: 50px;"><i>Justice</i></p> <p>-----X</p> <p>RAME, LLC,</p> <p style="text-align: center; margin-left: 150px;">Plaintiff,</p> <p style="text-align: center; margin-left: 100px;">- v -</p>	<p>PART <u>IAS MOTION 12</u></p> <p>INDEX NO. <u>157438/2020</u></p> <p>MOTION DATE _____</p> <p>MOTION SEQ. NO. <u>001</u></p>
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METROPOLITAN REALTY MANAGEMENT, INC.,
METROPOLITAN LIFE INSURANCE COMPANY,
200 PARK, L.P.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 15, 17, 25-29 were read on this motion for injunction/restraining order.

By order to show cause, plaintiff moves for an order enjoining defendant from terminating its lease (*see First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968]). Defendant opposes. The action was discontinued against defendants Metropolitan Realty Management, Inc. and Metropolitan Life Insurance Company, leaving the current owner/landlord as the only remaining defendant. (NYSCEF 16).

I. PERTINENT BACKGROUND

By lease dated January 1, 1984, plaintiff-tenant leased the premises at issue from defendant-landlord/owner. (NYSCEF 21).

On or about September 2, 2020, defendant sent plaintiff a notice of default, alleging that it owes unpaid rent from December 1, 2017 through September 1, 2020 in the amount of \$1,863,821.70, and provided plaintiff with a deadline of on or before September 14, 2020 to cure the default. (NYSCEF 27). Plaintiff commenced the instant action on September 14, 2020, at

10:17 pm, by summons and complaint (NYSCEF 1, 2), and also electronically filed its proposed order to show cause seeking the *Yellowstone* injunction, with an affidavit in support and a memorandum of law (NYSCEF 7, 8, 13).

Although plaintiff had requested a temporary restraining order (TRO) in its motion papers, there is no indication in the record that it complied with the notice requirements set forth in 22 NYCRR § 202.7(f). Rather, on September 17, 2020, plaintiff's counsel filed an application in support of plaintiff's request, and provided therein that at 4:20 pm on September 14, counsel had attempted to contact an attorney who apparently represented defendant but as he was unable to reach him or her, he left a voicemail advising that plaintiff would be seeking a TRO. (NYSCEF 15).

On September 21, 2020, after oral argument on the TRO application, the TRO was granted and defendant was given time to oppose the motion. (NYSCEF 17).

II. CONTENTIONS

A. Plaintiff (NYSCEF 8, 13)

Plaintiff contends that it is entitled to a *Yellowstone* injunction as it holds a commercial lease and received a notice of default, the cure period set forth therein has not yet expired, and it is able and willing to cure its default. It alleges that it operates numerous restaurants in the premises, all of which depend on in-person and indoor dining which, as of March 2020, have been prohibited and/or severely curtailed due to the Covid-10 pandemic pursuant to executive orders issued by the Governor of the State of New York. As a result, plaintiff's business and profits have declined, and it has been unable to pay its rent, a circumstance which it characterizes as a frustration and impossibility of performance of the lease.

Plaintiff observes that the lease specifically permits a rent abatement in the event that it is

unable to operate its business in the premises due to, among others, a national emergency or a governmental agency's order or rule, and it argues that it therefore does not owe defendant the amount of rent set forth in the default notice.

Nevertheless, plaintiff maintains that it "has the ability to cure the alleged default and/or subsequent amounts that become due while this action is pending, separate and apart from the amounts allegedly due and owing Defendants as a result of the COVID-19 pandemic which Plaintiff does not believe it owes due to the frustration of its Lease with Defendants."

B. Defendant (NYSCEF 25, 29)

Defendant denies that plaintiff was prohibited from operating its business as a take-out restaurant, which has been permitted for several months, or from offering outdoor dining, which has been permitted since July 2020, or limited indoor dining has been permitted since the end of September 2020. Nonetheless, plaintiff has kept its business completely closed since March 2020. Thus, any inability on its part to conduct its business and earn money is entirely plaintiff's fault.

According to defendant, the lease also requires that plaintiff pay rent without a deduction or offset for any reason. Absent a dispute that plaintiff owes it rent, and will continue to owe it rent, defendant requests that the *Yellowstone* injunction, if any, be conditioned on plaintiff paying the amount of rent it owes into court, as well as continuing use and occupancy.

Defendant also argues that plaintiff's application is untimely, as the cure period expired on September 14, 2020, and plaintiff did not file its application until after the close of business that day. Moreover, defendant claims that plaintiff did not fully interpose its application until September 17 and that the TRO was not granted until September 21, by which time the cure period had expired. And, absent a good faith dispute that plaintiff owes rent, defendant contends

that there is no basis on which to grant a *Yellowstone* injunction.

III. ANALYSIS

A party seeking a stay of the period within which an alleged default must be cured until the merits of the dispute are resolved in court and to avoid the forfeiture of a substantial leasehold interest, must demonstrate that it: (1) holds a commercial lease; (2) received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) requested injunctive relief prior to the termination of the lease; and (4) is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises. (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.*, 93 NY2d 508, 514 [1999]).

It is the movant's burden to “convince the court of his desire and ability to cure the defects by any means.” (*Jemaltown of 125th St., Inc. v Leon Betesh/Park Seen Realty Assocs.*, 115 AD2d 381, 381 [1st Dept 1985]). That the movant denies a default is not dispositive, as long as it evinces a good faith willingness to cure. (*Artcorp. Inc. v Citirich Realty Corp.*, 124 AD3d 545, 546 [1st Dept 2015]).

A. Timeliness

Defendant offers no authority for the proposition that the cure deadline set forth in its notice of default expired at 5 pm on September 14. Moreover, that plaintiff filed an additional affidavit on September 17 and that the court heard argument and issued the TRO on September 21 does not annul the filing of the application for a *Yellowstone* injunction before the cure period had ended. (*See e.g., Austrian Lance & Stewart, P.C. v Rockefeller Ctr. Inc.*, 163 AD2d 125 [1st Dept 1990] [cure period did not end until midnight on final day of period, as notice to cure provided cure period in days and not hours]; General Construction Law § 19 [calendar day runs from midnight to midnight]).

B. Yellowstone

Whether plaintiff is entitled to an abatement of rent under the lease, i.e., whether it will ultimately prevail in proving that it owes less than defendant asserts, is irrelevant to whether it is entitled to a *Yellowstone* injunction. Rather, the key issue is plaintiff's willingness and ability to cure its default, and it has indicated both.

However, as plaintiff allegedly owes defendant a large sum of money in back rent and continues to accrue significant monthly arrears, an undertaking is appropriate, as is its payment of use and occupancy going forward and pending the determination of this action. (*See Metro. Tr. Auth. v 2 Broadway LLC*, 279 AD2d 315 [1st Dept 2001] [while tenant properly granted *Yellowstone* injunction, it should have been ordered to pay use and occupancy notwithstanding dispute as to whether it was entitled to offsets against rent]; *61 W. 62nd Owners Corp. v Harkness Apt. Owners Corp.*, 173 AD2d 372 [1st Dept 1991] [court properly conditioned *Yellowstone* relief on tenant's payment of undertaking and payment of use and occupancy]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's application for a *Yellowstone* injunction is granted on the condition that that it pay its current rent and other rental obligations to defendant as they become due on a monthly basis, beginning on November 1, 2020, and on the additional condition that, within 20 days of the date of this order, it post an undertaking in the sum of \$1,092,156.33, representing 50 percent of the amount due as of October 1, 2020, and provide proof thereof to the court, at which point a supplemental order will issue.

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10/27/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE