

Metro PCS N.Y., LLC v 416 Ocean Tenants Corp

2021 NY Slip Op 32774(U)

December 23, 2021

Supreme Court, Kings County

Docket Number: Index No. 532463/2021

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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METRO PCS NEW YORK, LLC d/b/a METRO PCS,
Plaintiff,

Decision and order

- against -

Index No. 532463/2021

416 OCEAN TENANTS CORP,
Defendant,

December 23, 2021

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved by order to show cause seeking a Yellowstone injunction staying the defendant's ability to commence any action to recover the premises. The defendant has opposed the motion. Arguments were held and after reviewing all the arguments, this court now makes the following determination.

On June 17, 2010 the plaintiff tenant entered into a communications site lease with defendant landlord concerning a portion of the property located at 416-434 Ocean Avenue in Kings County. On June 20, 2021 the defendant served a sixty day notice to cure certain alleged defaults, specifically, that the tenant performed unauthorized electrical work without obtaining any permits. Indeed, a fire occurred at the premises on May 8, 2021 which the landlord attributed to tenant's unlawful conduct. The tenant did not answer the notice to cure and on September 30, 2021 the landlord served a notice of termination effective on November 10, 2021. On December 21, 2021, after the cure period expired and after a notice of termination date also expired, the plaintiff filed an order to show cause seeking a Yellowstone

injunction. As noted, the defendant landlord opposes the request.

Conclusions of Law

A Yellowstone injunction is a remedy whereby a tenant may obtain 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" (Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs., 93 NY2d 508, 693 NYS2d 91 [1999], First National Stores v. Yellowstone Shopping Center Inc., 21 NY2d 630, 290 NYS2d 721 [1968]).

Thus, a tenant seeking a Yellowstone must demonstrate that: (1) it holds a commercial lease, (2) it has received from the landlord a notice of default, (3) its application for a temporary restraining order was made prior to expiration of the cure period and termination of the lease, and (4) it has the desire and ability to cure the alleged default by any means short of vacating the premises (see, Xiotis Restaurant Corp., v. LSS Leasing Ltd. Liability Co., 50 AD3d 678, 855 NYS2d 578 [2d Dept., 2008]).

In this case, there is no dispute the plaintiff sought a Yellowstone injunction after the cure period expired, which is improper (see, Korova Milk Bar of White Plains Inc., v. Pre Properties LLC, 70 AD3d 646, 894 NYS2d 499 [2d Dept., 2010]). Further, the court in Korova Milk specifically rejected reliance

on prior cases including Long Island Gynecological Services, P.C. v. 1103 Stewart Ave. Associates, Ltd. Partnership, 224 AD2d 591, 638 NYS2d 959 [2d Dept., 1996] which seemed to permit the filing of Yellowstone relief after the cure period expired in limited circumstances. Thus, the plaintiff cannot rely upon that case or other cases which espoused a relaxed filing deadline after the expiration of the cure period. Indeed, as the court held in Riesenburger Properties LLLP v. Pi Associates LLC, 155 AD3d 984, 65 NYS3d 218 [2d Dept., 2017] "where a tenant fails to make a timely request for a temporary restraining order, a court is divested of its power to grant a Yellowstone injunction" (id).

The plaintiff argues that despite the fact it did not seek an injunction during the cure period the court should nevertheless employ its equitable powers and grant the injunction in favor of the public interest. Specifically, the tenant argues that the location in question, a wireless communications site, "provides critical and essential wireless service to thousands of customers and provides emergency 911 service for the broader Kings County community. This is particularly critical during the ongoing global COVID-19 pandemic. Indeed, during the course of the pandemic and various shutdowns, the operation and maintenance of telecommunication was considered an essential function" (Memorandum of Law, page 6). While that may be true, the court is simply left without any authority to entertain the injunction

that was first raised after the cure period has expired.


Therefore, based on the foregoing the court is constrained to deny the relief requested.

Therefore, the motion seeking a Yellowstone injunction is consequently denied.

So ordered.

ENTER:

DATED: December 23, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC