

<b>Sampatco Inc v 86 1/2 Nassau LLC</b>
2022 NY Slip Op 30602(U)
February 22, 2022
Supreme Court, New York County
Docket Number: Index No. 154219/2020
Judge: Alexander Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER TISCH PART 18

Justice

INDEX NO. 154219/2020

SAMPATCO INC,

08/02/2021,

Plaintiff,

MOTION DATE 08/02/2021

- v -

MOTION SEQ. NO. 001 002

86 1/2 NASSAU LLC, JOHN ELLIS, GIACOMO VELTRI, THERESA VELTRI,

DECISION + ORDER ON MOTION

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 10, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 72

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR

The following e-filed documents, listed by NYSCEF document number (Motion 002) 66, 67, 68, 69, 70, 71, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 96

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

Upon the foregoing documents, plaintiff-commercial tenant Sampatco Inc., moves by order to show cause dated July 27, 2020 (NYSCEF Doc No. 10 [Feinman, J.]) for a Yellowstone injunction (First Natl. Stores v Yellowstone Shopping Ctr., 21 NY2d 630 [1968]) tolling and staying the running of the Notice(s) to Cure issued by defendant-landlord 86 1/2 Nassau LLC (defendant) and enjoining all defendants to cease obstructing plaintiff's application for a certificate of occupancy.

As an initial matter, the Court agrees with defendants that plaintiff failed to set forth its basis for the injunctive relief pursuant to CPLR 6311 or 6301. Accordingly, that branch of the motion is denied without prejudice.

“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” (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999] [hereinafter *Graubard*]; see *Lexington Ave. & 42nd St. Corp. v 380 Lexchamp Operating, Inc.*, 205 AD2d 421, 423 [1st Dept 1994] [its purpose “is to maintain the status quo so that the tenant may challenge the landlord’s assessment of its rights without the tenant . . . forfeiting its valuable property interest in the lease”]).

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 (*Graubard*, 93 NY2d at 514, quoting *225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421 [1st Dept 1995]).

Because “courts cannot reinstate a lease after the lapse of time specified to cure a default” (*Goldstein v Kohl's*, 16 AD3d 622, 623 [2d Dept 2005]), an application for *Yellowstone* relief must be made not only before the termination of the subject lease . . . but must also be made prior to the expiration of the cure period set forth in the lease and the landlord’s notice to cure” (*Korova Milk Bar of White Plains, Inc. v PRE Props., LLC*, 70 AD3d 646, 647 [2d Dept 2010]).

On May 28, 2020,<sup>1</sup> defendant served on plaintiff a fifteen-day notice of default for allegedly failing to provide proof of insurance in violation of paragraphs 58 (A) and (B), 48 (D),

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<sup>1</sup> The May 28, 2020 notice superseded the substantially similar notice of default dated May 22, 2020 (NYSCEF Doc No. 34 at 7, n 1).

and 53 (F) (iv) of the lease between the plaintiff and defendant dated October 25, 2018 (see NYSCEF Doc No. 19). The time to cure set forth in the notice of default expired on June 17, 2020. On June 18, 2020, defendant served plaintiff with a five-day notice of lease cancellation, which sought to terminate the lease as of June 25, 2020 (see NYSCEF Doc No. 20).

Plaintiff filed this action on June 11, 2020 and the instant *Yellowstone* application on June 22, 2020, which was after the time to cure set in the notice of default expired. Additionally, because “[a] motion on notice is made when a notice of the motion or an order to show cause is served” (CPLR 2211) and, here, the order to show cause was served on July 28, 2020 (see NYSCEF Doc Nos. 14-15), the application is untimely as it was made past both the applicable cure period and lease termination.

Although plaintiff claims that counsel “timely filed” the instant application, summons and complaint, and request for judicial intervention, and paid all the related fees on June 11, 2020 and that any delay since then was caused by “the pandemic” (see NYSCEF Doc No. 48 at ¶¶ 47-50), it is unavailing as the clear language of CPLR 2211 states that a motion is made when it is served (see generally Prof. Patrick M. Connors, Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, C2211:5 [“Since the order to show cause is initially submitted to the court ex-parte, one may be tempted to assume that the motion it seeks to bring on is deemed ‘made’ at the time of its submission. It is not.”]; see *id.* citing *Voice Communications, Inc. v Bello*, 12 Misc 3d 318, 320 [Sup Ct, Nassau County 2006] [“Delivery of an order to show cause to the courthouse for signature is not the equivalent of making a motion”]).

Accordingly, the Court is without jurisdiction to grant the application (see *Korova Milk Bar of White Plains, Inc.*, 70 AD3d at 648 [“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”]);

*KB Gallery, LLC v 875 W. 181 Owners Corp.*, 76 AD3d 909 [1st Dept 2010] [“The motion court properly found that plaintiff did not timely seek *Yellowstone* relief, since plaintiff did not make its application until after the applicable cure period had expired and the notice of termination had been served”] [internal citations omitted]; *King Party Ctr. of Pitkin Ave. v Minco Realty*, 286 AD2d 373, 375 [2d Dept 2001] [plaintiff’s “failure to move for a restraining order before the cure period expired resulted in an irrevocable lapse of the time to cure and divested the Supreme Court of its power to grant a *Yellowstone* injunction”)].


Consequently, the plaintiff’s arguments “addressed to the merits of the alleged defaults, including the contention that no default could occur before the ‘commencement date’ of the lease, are irrelevant insofar as the *Yellowstone* injunction is concerned” (*King Party Ctr.*, 286 AD2d at 375; see *1894 Eastchester Professional Bldg., Ltd. v Christopher*, 49 Misc 3d 135[A], 2015 NY Slip Op 51481[U] [App Term, 1st Dept 2015] [“once Supreme Court determined that the *Yellowstone* application was untimely, the ‘merits of the alleged [lease] defaults . . . [became] irrelevant’”], quoting *King Party Ctr.*, 286 AD2d at 375). The same applies to plaintiff’s arguments claiming it cured the alleged defaults by procuring insurance — it still “needed to move for *Yellowstone* relief before the expiration of the specified period” (*Three Amigos SJL Rest., Inc. v 250 W. 43 Owner LLC*, 144 AD3d 490, 491 [1st Dept 2016]).

In motion sequence no. 2, plaintiff moves by order to show cause dated October 27, 2020 (NYSCEF Doc No. 70 [Feinman, J.]) to submit additional information on the *Yellowstone* application, namely screenshots of a text message between plaintiff and defendant’s representatives, wherein plaintiff sent defendant a certificate of insurance. The motion is denied as moot as: (1) it is irrelevant to the *Yellowstone* application whether or not the default occurred;

and (2) the certificate of insurance itself was already in the record as an exhibit submitted by the defendant in NYSCEF docket number 32.

Accordingly, it is hereby ORDERED that the motions are denied; and it is further ORDERED that any interim relief granted in the orders to show cause or by the Court during argument are lifted.

This shall constitute the decision and order of the Court.

<u>2/22/2022</u> DATE	 ALEXANDER TISCH, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE