

Prinkipas LLC v Charlton Tenants Corp.
2022 NY Slip Op 32689(U)
August 8, 2022
Supreme Court, New York County
Docket Number: Index No. 653598/2019
Judge: Kathy J. King
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHY KING PART 06

Justice

-----X

PRINKIPAS LLC,

Plaintiff,

- v -

CHARLTON TENANTS CORP, ABC MANAGEMENT CORP., ABC MANAGEMENT INC.,ABC REALTY, ABC PROPERTIES, ABC MANAGEMENT CORP D/B/A ABC MANAGEMENT INC.,ABC MANAGEMENT CORP. D/B/A ABC REALTY, ABC MANAGEMENT CORP. D/B/A ABC PROPERTIES, RALPH DAVIS, DAVID ROSENBERG

Defendant.

-----X

INDEX NO. 653598/2019

MOTION DATE 09/23/2019, 06/01/2021

MOTION SEQ. NO. 003 006

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 84, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 186

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 006) 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 165, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 185

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

Upon the foregoing documents, defendant Charlton Tenants Corp. ("Charlton") and defendants ABC Management Corp., ABC Management Inc., ABC Realty, ABC Properties, ABC Management Corp. d/b/a ABC Management Inc., ABC Management Corp. d/b/a ABC Realty, ABC Management Corp. d/b/a ABC Properties, Ralph Davis and David Rosenberg (the "Non-Coop Defendants") move to dismiss plaintiff's complaint based on CPLR 3211(a)(1) and

3211(a)(7) (Mot. Seq. No.003). Plaintiff Prinkipas LLC opposes the motion as to Charlton only.¹

Plaintiff moves by order to show cause for a *Yellowstone* injunction, pursuant to CPLR 6301. Upon the signing of the thereof, the Court granted a temporary restraining order,² which enjoined and restrained Charlton from taking any action to terminate plaintiff's lease pursuant to a Notice to Terminate and tolled plaintiff's time to cure any default identified therein. (Mot. Seq. No. 006). Charlton submits opposition to the motion.

BACKGROUND

On or about December 1, 2018, plaintiff entered into a lease with Charlton to lease the first floor commercial space, Unit 1F (the "Leased Space"), as a first class restaurant space with bar (the "Lease"). The Leased Space provides for an outdoor seating area (the "Outdoor Seating Area"). Charlton is the owner of the land and building located at 1 Charlton Street, New York, NY, a/k/a 210 Sixth Avenue, New York, NY. Charlton is a residential co-op building with a commercial space on the first floor and is governed by a board of directors. Defendant, David Rosenberg ("Rosenberg"), is the President of Charlton's board of directors.

While the prior tenant who occupied the leased space also operated a restaurant, plaintiff upon leasing the property determined that work performed on the leased space was not code compliant and performed without permits or approval from the New York City Department of Buildings ("DOB") As a result, plaintiff had to perform extensive renovations to build its restaurant and bring the leased space up to code. The Lease provides for outdoor seating on the sidewalk.

¹ During oral argument on July 8, 2021, plaintiff's counsel indicated that the plaintiff does not oppose the dismissal of the complaint as to the Non-Coop defendants, therefore, the Court shall only consider the opposition to Charlton's motion.

² The TRO was granted pending the hearing date and by order dated July 1, 2021, the Court extended the TRO pending the determination of the order to show cause.

Article 6 of the Lease between plaintiff and defendant provides that defendant will not unreasonably withhold its consent for plaintiff's alterations and renovations. Plaintiff claims that that defendant unreasonably held its consent for the following: 1) the number of outdoor seats; 2) the façade permit; and 3) approval of new plumbing lines. As a result, plaintiff commenced the underlying action sounding in breach of the Lease (First Cause of Action); breach of the duty of good faith and fair dealing (Second Cause of Action); breach of the covenant of quiet enjoyment (Third Cause of Action); commercial tenant harassment (Fourth Cause of Action); injunctive relief (Fifth Cause of Action); intentional tort (Sixth Cause of Action); and partial eviction (Seventh cause of action). Defendant Charlton and non-coop defendants now moves to dismiss the plaintiff's complaint.

Plaintiff also moves this Court for injunctive relief based on defendant's Notice of Termination dated May 22, 2021 wherein defendant demands that plaintiff "cease use of the cellar for food, bar and restaurant service and continued vandalization of the landlord's outdoor security cameras" (NYSCEF Doc. No. 154). The Notice of Termination also states that because plaintiff has not "fully dismantled the restaurant service area, tables, seating, decorations and other appurtenances of a dining area located in the cellar" and has "placed black masking tape over the outdoor security cameras" that the defendant installed in the outdoor seating area, plaintiff is in default of Sections 4(A), (B), (C), (H) (ii), 6(A), 6(A)(i) and (iv), 9(A), 14 and 43 of the Lease. The Notice of Termination further indicates that if plaintiff continues to fail to dismantle the dining area in its entirety and to block defendant's security cameras, then defendant will seek to terminate the Lease on five days' notice. According to defendant, the Notice of Termination arose from plaintiff's non-compliance with a cease and desist notice

dated April 28, 2021, which demanded that plaintiff “immediately cease serving restaurant patrons food and alcoholic beverages” in the cellar.

Plaintiff in its moving papers contends that the defaults have no merit and that in the event, the Court concludes otherwise, it is prepared to cure said defaults. Accordingly, plaintiff moves for a Yellowstone injunction staying termination of the lease, during the pendency of this action, and tolling plaintiff’s time to cure. Additionally, plaintiff also seeks an order pursuant to CPLR 3025, granting plaintiff leave to serve a supplemental complaint.

Defendant’s Motion To Dismiss

On a motion to dismiss, pursuant to CPLR 3211 (a) (7), “the pleading is to be afforded a liberal construction,” and “the facts as alleged in the complaint [are presumed] as true” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]), “factual claims [that are] either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration” (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991] [internal quotation marks and citation omitted]).

Dismissal under CPLR 3211 (a) (1) is only appropriate if the “documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002], citing *Leon v Martinez*, 84 NY2d at 88). “A paper will qualify as ‘documentary evidence’ only if it satisfies the following criteria: (1) it is ‘unambiguous’; (2) it is of ‘undisputed authenticity’; and (3) its contents are ‘essentially undeniable’” (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86-87 [2d Dept 2010]). For example, documentary evidence has been held to include judicial records, transactional documents such as mortgages, deeds, contracts and trust agreements, the contents of which are

essentially undeniable, but not affidavits, emails, letters, depositions, and trial testimony (*see Odan Labs. Ltd. v Alkem Labs. Ltd.*, 184 AD3d 427, 428 [1st Dept 2020]; *Fontanetta v John Doe I*, 73 AD3d at 85-86).

Firstly, the Court notes that the complaint is dismissed as to the Non-Coop defendants since said defendants are not parties to the Lease, and plaintiff does not submit opposition for dismissal of all claims against these defendants (NYSCEF Doc. No. 186, transcript of oral argument of motion No. 003 at 4).

Breach of Contract (FIRST CAUSE OF ACTION)

Defendant asserts that plaintiff has not pled the elements of a breach of contract action which are the existence of a contract between the parties, plaintiff's performance thereunder, defendant's breach and resulting damages (*Alloy Advisory, LLC v 503 W. 33rd St. Assoc., Inc.*, 195 AD3d 436, 436 [1st Dept 2021]; *Markov v Katt*, 176 AD3d 401, 401-402 [1st Dept 2019]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Plaintiff has pled a cause of action for breach of contract since the Lease is a contract between the parties, and plaintiff alleges that it performed its obligations by submitting its plans for the demolition, façade work, plumbing work, and outdoor seating to Charlton in order to seek approval as required under the Lease. It further alleges that defendant unreasonably withheld consent, in violation of its obligations under the Lease, which constituted a breach. As a result of the breach, plaintiff was prohibited from obtaining necessary permits for the work and the outdoor seating area, and suffered damages.

While defendant submits a report by its architect as proof that plaintiff failed to obtain approval before performing work in violation of Article 6 of the Lease, together with rent demand letters from counsel, these documents are not unambiguous or essentially undeniable

and fail to conclusively establish its defense. A complaint may not be dismissed “based on documentary evidence unless the factual allegations are definitively contradicted by the evidence or a defense is conclusively established” (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d at 193 [internal quotation marks and citations omitted]).

The Court finds that defendant fails to provide a basis to dismiss plaintiff’s breach of contract claim and this branch of defendant’s motion is denied. Rather, defendant has highlighted that there are disputed factual issues as to which party breached the Lease first, and whether the other party then was obligated to continue to perform.

Breach of the Duty of Good Faith and Fair Dealing
(SECOND CAUSE OF ACTION)

Upon review of the papers herein, the Court finds that plaintiff’s claim for breach of the duty of good faith and fair dealing is duplicative of plaintiff’s claim for breach of contract, and therefore is dismissed.

While a covenant of good faith and fair dealing is implied in all contracts, a claim for breach of that covenant “cannot be maintained where, as here, the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of the contract” (*Board of Mgrs. of Soho N. 267 W. 124th St. Condominium v NW 124 LLC*, 116 AD3d at 507, quoting *Bostany v Trump Org. LLC*, 73 AD3d 479, 481 [1st Dept 2010]). Such claim is duplicative of the contract claim where it arises out of the same facts and merely repleads that the defendant did not act in good faith in performing its contractual obligations and seeks the same damages (*see Parlux Fragrances, LLC v S. Carter Enterprises, LLC*, 204 AD3d 72 [1st Dept 2022]; *320 W. 115 Realty LLC v All Bldg. Constr. Corp.*, 194 AD3d 511, 512 [1st Dept 2021])

Here, plaintiff's Second Cause of Action alleges that defendant Charlton breached its duty of good faith by failing to timely approve plans based on the same facts, and seeks the identical amount of damages, as it seeks for the first claim for breach of contract.

**Breach of the Covenant of Quiet Enjoyment (THIRD CAUSE OF ACTION) And
Partial Eviction (SEVENTH CAUSE OF ACTION)**

A cause of action for breach of the covenant of quiet enjoyment may be predicated on a constructive or actual eviction and requires that the tenant demonstrate that a problem caused by the landlord materially deprived it of the beneficial use and enjoyment of the premises (constructive eviction), or that the tenant was physically prevented from possessing a portion of the premises (actual partial eviction) (*see Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82 [1970]; *Shackman v 400 E. 85th St. Realty Corp.*, 161 AD3d 438, 439 [1st Dept 2018]; *Pacific Coast Silks, LLC v 247 Realty, LLC*, 76 AD3d 167, 172 [1st Dept 2010]). “Constructive eviction exists where, although there’s been no physical expulsion or exclusion of the tenant, the landlord’s wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premise” (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d at 83). Where the tenant is ousted from a portion of the premises, the “eviction is actual, even if only partial” (*id.*).

In the seventh cause of action, plaintiff alleges that defendant reduced the number of outdoor seats (NYSCEF Doc. No. 87, Levy aff, ¶ 7; see NYSCEF Doc. No. 88, Lease, ¶¶ 4 [Q] [ii], 43 “Premises” definition), prevented the move of water risers in order to install new code complaint waste and drain lines, and its refusal to approve other work, all effected a partial eviction of plaintiff from the leased space (*id.*, compl, ¶¶ 116-118).

Contrary to defendant’s contention, claims for breach of the covenant of quiet enjoyment and partial actual and constructive eviction may be asserted by a tenant offensively (*see Shackman*

v 400 E. 85th St. Realty Corp., 161 AD3d at 439; *Appliance Giant, Inc. v Columbia 90 Assoc., LLC*, 8 AD3d 932, 933 [3d Dept 2004]; *Oresky v Azzoni*, 232 AD2d 463, 464 [2d Dept 1996]; *Bernard v 345 E. 73rd Owners Corp.*, 181 AD2d at 544). Where, as here, there are issues of fact as to whether, as plaintiff alleges, it has abandoned a portion of the premises based on the defendant's wrongful acts, thus dismissal under CPLR 3211 is inappropriate (*see Bernard v 345 E. 73rd Owners Corp.*, 181 AD2d at 544).

Commercial Tenant Harassment (FOURTH CAUSE OF ACTION)

Pursuant to NYC Administrative Code § 22-902(a) (NYC Admin Code), a “landlord shall not engage in commercial tenant harassment” that is, any act or omission by the landlord that “would reasonably cause a commercial tenant to vacate covered property, or to surrender or waive any rights under a lease” in relation to the covered property and includes: “(10) engaging in any other repeated or enduring acts or omissions that substantially interfere with the operation of the commercial tenant’s business” or “(13) unreasonably refusing to cooperate with a tenant’s permitted repairs or construction activities”(NYC Admin Code § 22-902 [a][10]and [13]). This local law is a remedial statute and, as such, must be “liberally construed” and “interpreted broadly to accomplish its goals” (*see Kimmel v State of New York*, 29 NY3d 386, 396 [2017] [internal quotation marks and citation omitted]; *Paskar Group, LLC v Broad St. Suites, LLC*, 2021 WL 3290835, * 2 [Sup Ct, NY County July 26, 2021]).

Plaintiff alleges that defendant Charlton has engaged in a pattern of conduct to force plaintiff to waive its rights for additional outdoor seating (up to the amount of the city permit), as well as for, additional seats that will be located in the space where the original water risers are located. These allegations are sufficient to state a claim for commercial tenant harassment (*see generally One Wythe LLC v Elevations Urban Landscape Design Inc.*, 67 Misc 3d 1207[A], 2020

NY Slip Op 50437[U]; *45-47-49 Eighth Ave. LLC v Conti*, 72 Misc 3d 1210[A], 2021 NY Slip Op 50691[U], * 7 [Sup Ct, NY County 2021]). Accordingly, defendant Charlton's motion to dismiss commercial tenant harassment under the NYC Admin Code § 22-901 et seq is denied.

Injunctive Relief (FIFTH CAUSE OF ACTION)

As to plaintiff's Sixth Cause of Action for intentional tort based on defendant's failure to approve and resulting delays in construction, the Court finds that dismissal is warranted as a matter of law. Breach of contract is not considered a tort unless a duty independent of the contract itself is violated (*Board of Mgrs. of Soho N. 267 W. 124th St. Condominium v NW 124 LLC*, 116 AD3d 506, 507 [1st Dept 2014]; see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]; *Cobblestone Foods, LLC v Branded Concept Dev., Inc.*, 200 AD3d 847 [2d Dept 2021]).

Defendant Charlton moves to dismiss the plaintiff's fifth cause of action for injunctive relief. Plaintiff alleges that defendant unreasonably withheld approval for various permits, applications, and other documents needed to complete renovations, and that plaintiff has no adequate remedy at law. The Court agrees with defendant that injunctive relief typically is not the appropriate remedy for a breach of contract. However, where an injunction is sought in connection with a lease and certain non-monetary breaches are alleged which deprive plaintiff of the ability to complete renovations and use portions of the premises. Thus, the Court finds the plaintiff's fifth cause of action, which seeks an injunction enjoining defendant Charlton from withholding approvals, sufficiently states a claim.

Plaintiff's Order to Show for a Yellowstone Injunction

Plaintiff moves for a Yellowstone Injunction to enjoin and restrain defendant Charlton from taking any action to terminate the Plaintiff's lease. "The purpose of a *Yellowstone* injunction

is to maintain the status quo so that the tenant may challenge the landlord's assessment of its rights without the tenant, during the pendency of the action, forfeiting its valuable property interest in the lease” (*Lexington Ave. & 42nd St. Corp. v 380 Lexchamp Operating*, 205 AD2d 421, 423 [1st Dept 1994]; *see Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]; *Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 25-26 [1984]). The law disfavors forfeiture, and a *Yellowstone* injunction, unlike a preliminary injunction under CPLR Article 63, does not require a demonstration of likelihood of success on the merits (*Post v 120 E. End Ave. Corp.*, 62 NY2d at 25; *Artcorp Inc. v Citirich Realty Corp.*, 124 AD3d 545, 545 [1st Dept 2015]; *WPA/Partners v Port Imperial Ferry Corp.*, 307 AD2d 234, 237 [1st Dept 2003]; *Lexington Ave. & 42nd St. Corp. v 380 Lexchamp Operating*, 205 AD2d at 423). The tenant also does not need to prove its ability to cure; “rather, the proper inquiry is whether a basis exists for believing that the tenant . . . has the ability to cure through any means short of vacating the premises” (*WPA/Partners v Port Imperial Ferry Corp.*, 307 AD2d at 237 [internal quotation marks and citation omitted]).

A tenant seeking 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 Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d at 514 [internal quotation marks and citation omitted]; *see also Lexington Ave. & 42nd St. Corp. v 380 Lexchamp Operating*, 205 AD2d at 423). The injunction stops the running of the applicable cure period in the default notice but does not relieve the tenant of the necessity

of complying with its lease obligations (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d at 514-515).

Here, plaintiff has clearly satisfied the foregoing criteria. Plaintiff is a commercial tenant, has received a Notice of Termination, and is requesting injunctive relief prior to the expiration of the time set forth in the notice. With respect to the fourth criteria, although denying responsibility for the alleged defaults set forth in the Notice to Terminate i.e., that plaintiff was using the cellar for food, bar and restaurant service and that it inappropriately put tape over defendant's security cameras, plaintiff nonetheless has evinced a willingness to cure any defaults, if found by the court (*see Boi To Go, Inc. v Second 800 No. 2 LLC*, 58 AD3d 482, 482 [1st Dept 2009]). Here, there has been no determination that plaintiff was using the cellar for such service or that defendant was entitled to place such security cameras to film what was going on in plaintiff's leased space. These disputed factual issues as to plaintiff's alleged lease violations will be resolved in this plenary action (*Prinkipas LLC v Charlton Tenants Corp.*, 193 AD3d 601, 601 [1st Dept 2021]; *see JDM Wash. St. LLC v 90 Wash. St., LLC*, 200 AD3d 612, 612 [1st Dept 2021]; *Boi To Go, Inc. v Second 800 No. 2 LLC*, 58 AD3d at 482). To the extent that defendant asserts a default based on plaintiff's failure to "dismantle" the dining furniture located in the cellar, this is arguably conduct permitted under the Lease and under the Certificate of Occupancy, that is, using the cellar for storage. There is no basis for this Court to require a tenant to take steps to cure an alleged default before it is determined that the lease was violated (*see Quik Park 808 Garage, LLC v 808 Columbus Commercial Owner LLC*, 187 AD3d 488, 488 [1st Dept 2020]).

The cases relied upon by defendant to support its claim that plaintiff fails to show a willingness to cure the alleged defaults, are distinguishable. They involve situations where the tenant blatantly showed it had no intention of curing an obvious breach of the lease (*Cemco*

Rests. v Ten Park Ave. Tenants Corp., 135 AD2d 461, 463 [1st Dept 1987]). Here, plaintiff has clearly stated its willingness to cure, by removing all items from the cellar and taking the tape off the defendant's security cameras, should that be necessary (NYSCEF Doc. No. 153, affidavit of Levy, ¶ 20) (*see Sokoloff Arts Found. Inc. v Nur Ashki Jerrahi Community*, 192 AD3d 524, 524-525 [1st Dept 2021]; *TSI West 14, Inc. v Samson Assoc., LLC*, 8 AD3d 51, 52 [1st Dept 2004]).

On the issue of an undertaking, this Court, in the exercise of its discretion, declines to impose a bond. The record here shows that plaintiff has expended considerable sums of money, performing a gut renovation costing over \$1 million (NYSCEF Doc. No. 70, ¶ 6) and added appreciable value to the premises, bringing it up to code, and this dispute is not a monetary one. In light of these extensive expenditures and improvements to the leased premises, as the Appellate Division already recognized on an earlier *Yellowstone* injunction in this case, there is no need to require plaintiff to post an undertaking (*Prinkipas LLC v Charlton Tenants Corp.*, 193 AD3d at 601; *see WPA/Partners LLC v Port Imperial Ferry Corp.*, 307 AD2d at 237; *see John A. Reisenbach Charter Sch. v Wolfson*, 298 AD2d 224, 224 [1st Dept 2002]). Defendant will be adequately protected by the value of the building improvements already installed by plaintiff at its own expense (*see Kuo Po Trading Co. v Tsung Tsin Assn.*, 273 AD2d 111, 111 [1st Dept 2000]). The Court also notes that defendant requests an undertaking of \$100,000 without submitting any proof of its potential damages. Defendant's assertions that it could be subject to lawsuits based on plaintiff's alleged improper use of the cellar may be addressed by plaintiff's obligation to indemnify defendant for such suits under the Lease (NYSCEF Doc. No. 156, Lease). Therefore, the Court finds no need for an undertaking, but the plaintiff's motion is granted to the extent that during the pendency of this action, plaintiff continues to make all rental payments due under the Lease.

Additionally, the branch of plaintiff's motion seeking leave to serve a supplemental complaint, pursuant to CPLR 3025 (b), is granted. The supplemental complaint adds an eighth cause of action seeking a preliminary and permanent injunction, enjoining defendant from terminating the Lease based on the May 22, 2021 Notice, upon which its *Yellowstone* injunction application is based. Defendant Charlton does not oppose this branch of the motion, and plaintiff has alleged a basis for the claim. Thus, leave is granted for plaintiff to serve defendant Charlton with the supplemental complaint in the proposed form (NYSCEF Doc. No. 155).

Based on the foregoing, it is hereby;

ORDERED that the defendants' motion to dismiss is granted to the extent that all causes of action as against defendants ABC Management Corp., ABC Management Inc., ABC Realty, ABC Properties, ABC Management Corp. d/b/a ABC Management Inc., ABC Management Corp. d/b/a ABC Realty, ABC Management Corp. d/b/a ABC Properties, Ralph Davis and David Rosenberg are dismissed and the Clerk is directed to enter judgment accordingly in favor of said defendants (Mot. Seq. No. 003); and it is further,

ORDERED that the second and sixth causes of action also are dismissed as against defendant Charlton. In all other respects, defendant Charlton's motion to dismiss is denied; and it is further

ORDERED that the action is severed and continued against the defendant Charlton only; and it is further,

ORDERED that the plaintiff's motion for a *Yellowstone* injunction is granted on the condition that during the pendency of this action, plaintiff continues to make all rental payments due under the Lease. Defendant Charlton is enjoined and restrained from taking any action to terminate the plaintiff's Lease on the grounds set forth in defendant's May 22, 2021 Notice to

Terminate, and plaintiff's time to cure any default therein is tolled pending final adjudication of this action; and it is further

ORDERED that plaintiff is granted leave to serve the supplemental complaint in the proposed form (NYSCEF Doc. No. 155) is deemed served *nunc pro tunc* forthwith; and it is further

ORDERED that defendant Charlton shall file and serve an answer to the supplemental complaint within 20 days from entry of this order.

<u>08/08/2022</u> DATE		<u><i>/s/ Kathy J. King</i></u> KATHY KING, 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"/> GRANTED IN PART <input 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