

**2875 W. 8th St. Assoc., L.P. v Bonomo**

2022 NY Slip Op 32932(U)

August 25, 2022

Supreme Court, Kings County

Docket Number: Index No. 520683/2019

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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2875 WEST 8TH STREET ASSOCIATES, L.P.,  
Plaintiff,

Decision and order

- against -

Index No. 520683/2019

(1) Tico Bonomo, individually, Victor A. Bonomo and Zephra Bonomo, also known as Sophie Bonomo, as Trustees under Amended and Restated Revocable Trust Agreement made the 17th day of May, 1988 between Victor A. Bonomo, as Granter and Victor A. Bonomo and Zephra Bonomo, also known as Sophie Bonomo, as Trustees, Victor A. Bonomo and Zephra Bonomo, also known as Sophie Bonomo, as Trustees under Amended and Restated Revocable Trust Agreement made the 17th day of May, 1988 between Zephra Bonomo, also known as Sophie Bonomo, as Granter, and Zephra Bonomo, also known as Sophie Bonomo, and Victor A. Bonomo, as Trustees, and Tico Bonomo and Anna Bonomo, as Trustees under Trust Agreement dated the 17th day of May, 1988 between Victor A. Bonomo and Zephra Bonomo, also known as Sophie Bonomo, as Granters, and Tico Bonomo and Anna Bonomo, as Trustees,

(2) BONOMO GRANDCHILDREN'S TRUST, and

(3) TIROB REAL ESTATE PARTNERS, LTD.,,

Defendant,

August 25, 2022

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a Yellowstone injunction. The defendants have opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

On August 28, 1992 the plaintiff tenant entered into a lease with the Bonomo Trust concerning the rental of space located at 2875 West Eighth Street in Kings County. A notice to cure was served on March 3, 2022 and again on April 7, 2022 alleging one default, namely the failure to maintain adequate insurance

pursuant to the terms of the lease. The notice to cure was served by defendant Tirob Real Estate Partners Ltd., [hereinafter 'Tirob'] the successor-landlord of the property. The plaintiff has moved seeking a Yellowstone injunction arguing that Tirob had no authority to serve the notices and that in any event there is no basis to terminate the lease.

#### 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]).

The plaintiff asserts that Tirob is not the successor/landlord of the property and thus any notice sent was a

nullity. A review of the ownership history of this property is therefore necessary.

According to ACRIS on April 24, 1973 an entity called Tirob Real Estate Company Inc., recorded a deed demonstrating ownership of the property located at 2875 West 8<sup>th</sup> Street. On December 19, 1985 Tirob Real Estate Company Inc., conveyed its interest in the property to the Bonomo Trust and Tirob Real Estate Company Inc., was dissolved in April 1986. On February 22, 1991 and August 27, 1992 further transfers were made among various Bonomo family members. On September 28, 2015 Tirob Real Estate Company Inc., conveyed the deed to the property to Tirob. Tirob fails to explain how it obtained a deed from a company that had been dissolved for close to thirty years. Rather, Tirob merely asserts that plaintiff has admitted Tirob's ownership of the property. Tirob points to three documents to support that admission by the plaintiff. The first is an affirmation by an attorney representing both the plaintiff here and Tirob in a personal injury lawsuit entitled *Giarraffa v. Tirob Real Estate Partners Ltd., and 2875 West Eight Street Associates L.P.*, Index Number 501131/2019. There can be no admission by the plaintiff contained in a counsel's affirmation who also represents the defendant here. More importantly, that affirmation merely states that Tirob leased the premises to the plaintiff and is not an admission by the plaintiff regarding Tirob's ownership (see,

Affirmation in Support, ¶ 4 [NYSCEF Doc. #57]). The second document is a Statement of Material Facts in the Giarraffa matter wherein the same counsel for both the plaintiff and the defendant in this action asserts that "Defendant TIROB REAL ESTATE PARTNERS LTD. is the owner and landlord of the premises located at 2875 West 8th Street, Brooklyn, New York" (see, Statement of Material Facts, ¶ 1 [NYSCEF Doc. #58]). Again, that attorney's affirmation is not an admission by the plaintiff. The third document is an affidavit in the Giarraffa case from Michael Lonuzzi the property manager for the premises which states that "Tirob leased the premises to 2875 Associates, and was leasing the premises to 2875 Associates in July of 2018" (see, Affidavit of Michael Lonuzzi, ¶ 5 [NYSCEF Doc. #58]). However, Matthew Lonuzzi, the president of the plaintiff submitted an affidavit and disputed Tirob's ownership of the property (see, Affidavit of Matthew Lonuzzi, ¶ 12 [NYSCEF Doc. #48]). In any event, it does not matter at all whether individual members of the plaintiff submitted documents affirming Tirob's ownership. Ownership is not created by affirmations of tenants. Ownership is established by demonstrating proof of ownership, chief among them a valid deed with proper chain of title. In this case, there is no specific independent evidence demonstrating Tirob's ownership of the property. There is no explanation how Tirob obtained the deed from a dissolved corporation, there is no information

concerning any assignment from the Bonomo Trust, there is no purchase agreement from the Bonomo Trust and lastly there is no affidavit from anyone from the Bonomo Trust confirming the sale or transfer of the premises to Tirob. There is simply a deed, out of title, held by Tirob. That is insufficient to establish ownership. The mere fact the tenant had been paying Tirob the rental payments for a number of years does support a relationship between the two (see, Siegel v. Kentucky Fried Chicken of Long Island Inc., 108 AD2d 218, 488 NYS2d 744 [2d Dept., 1985]), however, again, that does not create ownership. Thus, there are significant questions of fact whether Tirob is in fact the owner of the premises.

Even if Tirob can cure the above noted title issues and demonstrate unequivocal ownership of the premises the issue of the failure to maintain adequate insurance must be addressed.

It is true that in JT Queens Carwash Inc., v. 88-16 N. Boulevard, LLC, 101 AD3d 1089, 956 NYS2d 536 [2d Dept., 2012] the court held that the failure to maintain requisite insurance is an incurable default demanding a denial of a Yellowstone injunction. However, in Great Wall 384 Inc., v. 384 Grand Street Housing, 2016 WL 5672959 [Supreme Court New York County 2016] the court held that a conditional Yellowstone was proper where the tenant "offers the ability to protect the landlord for the period in default" by either securing retroactive insurance or by posting a

bond for the amount of the deficient insurance. Thus, a distinction must be drawn between situations where no insurance existed at all (Kyong Sik Kim v. Idlywood NY LLC, 66 AD3d 528, 886 NYS2d 337 [1<sup>st</sup> Dept., 2009]) and situations where insurance existed but some deficiency likewise exists (see, Federated Retail Holdings Inc., v. Weatherly 39<sup>th</sup> Street LLC, 32 Misc3d 247, 920 NYS2d 896 [Supreme Court New York County 2011], see, also, Discount Columbia LLC v. Bogopa-Columbia Inc., 2017 WL 2909360 Supreme Court Kings County 2017]). Therefore, where a "tenant agrees either to bond the defendant for losses incurred as a result of a purportedly insured claim or states that it can secure retroactive insurance to protect the landlord, a cure is possible" (Lex Retail LLC v. 71<sup>st</sup> Street Lexington Corp., 2020 WL 2557862 [Supreme Court New York County 2020]).

Therefore, to forestall the further service of notices to cure based upon deficient insurance, the motion seeking a Yellowstone injunction is conditionally granted upon evidence presented to the court of either retroactive insurance or the posting of a bond protecting the landlord for any claims in excess of the coverage amounts.

So ordered.

ENTER:

DATED: August 25, 2022  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC