

Gas on Deck Inc. v 21/23 Ave. B Realty LLC
2022 NY Slip Op 33872(U)
November 16, 2022
Supreme Court, New York County
Docket Number: Index No. 158923/2022
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

GAS ON DECK INC., GAS ON DECK CAFE INC.

Plaintiffs,

- v -

21/23 AVENUE B REALTY LLC,

Defendant.

-----X

INDEX NO. 158923/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2- 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

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

Plaintiffs' motion for injunctive relief restraining defendant from terminating the commercial lease at issue is denied.

Background

Plaintiffs contend they are a commercial tenant in a building owned by defendant pursuant to a lease dated April 18, 2022. They claim that they received a ten-day notice of default and demand to cure on October 10, 2022, but that the notice was dated September 15, 2022. The notice contends that the "Tenant has defaulted under these provisions [of the lease] by dispensing marijuana at the premises" (NYSCEF Doc. No. 7).

Plaintiffs insist that defendant promised to pay up to \$66,000 to them for improvements pursuant to Section 88 of the lease. They argue that they have expended substantial sums to build out the premises and defendant has refused to pay the money it owes to plaintiffs. Plaintiffs

claim that “[w]e are not aware of anything we are doing that is illegal” (NYSCEF Doc. No. 4, ¶ 8). They emphasize they are current on the rent.

In opposition, defendant questions why the instant motion was brought on behalf of two entities when only one is identified in the lease. It argues that the cure period expired and so plaintiffs are not entitled to seek a *Yellowstone* injunction. Defendant contends the notice was properly served via overnight mail service and contained a ten-day cure period. It also argues that plaintiffs failed to make any showing of their ability or intent to cure the default.

Discussion

“To obtain a *Yellowstone* injunction, the tenant 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 both the termination of the lease and the expiration of the cure period set forth in the lease and the landlord's notice to cure, and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises” (*Barsyl Supermarkets, Inc. v Ave. P. Assoc., LLC*, 86 AD3d 545, 546, 928 NYS2d 45 [2d Dept 2011]).

Here, the Court denies the motion because plaintiffs failed to sufficiently address the purported violation of the lease cited by defendant. The notice asserted that plaintiffs are violating the lease by dispensing marijuana at the premises. Plaintiffs do not specifically deny that they are selling marijuana at the premises or assert they are and are going to stop. In fact, the moving papers do not mention the word marijuana at all. Instead, plaintiffs make a vague and conclusory assertion that they “are not aware of anything we are doing that is illegal” (NYSCEF Doc. No. 4, ¶ 8). More is required before this Court can grant injunctive relief.

The Court finds that plaintiffs were required to specifically acknowledge whether or not they are selling marijuana. But a vague denial about not doing anything illegal does not sufficiently address the issue identified by defendant. That conclusory denial, combined with the affidavit of the managing executive of defendant, compels the Court to deny the instant application. The managing executive claims, with precise detail, that he has visited the premises on multiple occasions in recent months and was led to back room in August 2022 where marijuana was being sold along with related paraphernalia (NYSCEF Doc. No. 20, ¶ 6). Mr. Levine, the managing executive, observes that the sale of marijuana is not permitted in the premises absent a specific license, which plaintiffs do not have (*id.* ¶ 7). He is concerned about the financial consequences of having a tenant at the building engaging in this unlicensed activity and the lease clearly requires plaintiffs to follow the law.


The Court need not even address the various procedural arguments offered by defendant regarding why the instant motion should be denied (such as whether or not the default notice was timely served). The fact is that plaintiffs eventually received it and, on the merits, they did not meet the requirements for a *Yellowstone* injunction on these papers. The Court has no interest in granting a vague request for a *Yellowstone* injunction where plaintiffs did not bother to discuss or address the specific basis for the default in the defendant's notice.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for injunctive relief is denied. All stays are hereby vacated.

Conference: February 8, 2023 at 11 a.m. By February 1, 2023, the parties are directed to upload 1) a discovery stipulation signed by all parties 2) a stipulation of partial agreement that identifies the areas in dispute or 3) letters explaining why no agreement about discovery could be

reached. The Court will then assess whether an in-person conference is needed. The failure to upload anything by February 1, 2023 will result in an adjournment of the conference.

<u>11/16/2022</u> DATE					 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<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