

International News & Mag., Inc. v 300 E. 86th St., LP
2022 NY Slip Op 34410(U)
December 23, 2022
Supreme Court, New York County
Docket Number: Index No. 656837/2022
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

INTERNATIONAL NEWS & MAGAZINE, INC., and M&Z
CONVENIENCE, INC.,

Plaintiffs,

- v -

300 EAST 86TH STREET, LP,

Defendant.

-----X

INDEX NO. 656837/2022

MOTION DATE 06/16/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 2, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29

were read on this motion for A "YELLOWSTONE" INJUNCTION.

LOUIS L. NOCK, J.

Upon the foregoing documents, and after argument, it is ordered that the plaintiffs' motion for an injunction pursuant to *First Natl Stores, Inc. v Yellowstone Shopping Ctr., Inc.* (21 NY2d 630, *rearg denied* 22 NY2d 827 [1968]) (a "Yellowstone Injunction"), is denied per the following memorandum.

BACKGROUND

Defendant is the owner of the building known as 300 East 86th Street, New York, New York (the "Building") (NYSCEF Doc. No. 6 [Affidavit of Zafar Ahmed] ¶ 4). For the past twelve years, plaintiffs have operated their businesses in the Building (*id.*). Plaintiff International News and Magazine, Inc., is the tenant in Store #3 in the Building (*id.*, ¶ 5). International and defendant's predecessor-in-interest, German News Co., Inc. (the "Original Landlord"), are parties to a commercial lease dated September 17, 2010, which was extended by a letter agreement dated May 17, 2016 (collectively, the "International Lease") (*id.*; *see also*,

NYSCEF Doc. No. 7). International operates a news stand at its leased location and, at the time of the filing of this motion, had three years, four and one-half months, remaining in its tenancy.

Plaintiff M&Z Convenience, Inc. (“M&Z”), is the tenant in Store #2 in the Building (the “M&Z Premises”) (NYSCEF Doc. No. 6 ¶ 7). M&Z and the Original Landlord are parties to a commercial lease dated September 17, 2010, which was extended by a letter agreement dated May 17, 2016 (collectively, the “M&Z Lease”) (*id.*; *see also*, NYSCEF Doc. No. 8). M&Z operates a gift shop at its leased location and, at the time of the filing of this motion, had three years, four and one-half months, remaining in its tenancy.

Plaintiffs received Notices to Cure from defendant which assert that they breached their respective leases by failing to provide defendant with proof of insurance (*see*, NYSCEF Doc. Nos. 9, 10). In the Notices to Cure, defendant warns plaintiffs that it may elect to terminate their leases unless they cure the alleged defaults on or before June 17, 2022.¹ Plaintiffs now move for a Yellowstone Injunction to prevent any termination of their leases so as to accommodate their desired cure of the asserted defaults forming the predicate for the defendant’s Notices to Cure.

The theory of the Notices to Cure relate to the leases’ proof of insurance requirements. The insurance certificates submitted by plaintiffs show that, since at least March 2022, plaintiffs have maintained liability coverage for only \$1,000,000.00 per occurrence with an aggregate limit of \$2,000,000.00 and have not maintained any umbrella coverage. Defendant maintains that such coverage stands in derogation of the leases, which require \$2,000,000.00 in combined single limit coverage (i.e., twice the amount of the coverage held by plaintiffs) (*see*, Leases [NYSCEF Doc. Nos. 7, 8] ¶¶ 8, 40). Moreover, the leases require umbrella coverage and do not permit the policy aggregate of \$2,000,000.00 (*id.*).

¹ Plaintiffs deny any default, although the instant motion by plaintiffs for a Yellowstone Injunction does not rely on a definite finding of an actual default.

DISCUSSION

A Yellowstone Injunction is designed to preserve 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. Assocs.*, 93 NY2d 508, 514 [1999]).

In order to obtain a Yellowstone Injunction, the movant must establish 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” (*id.*).

Where a lease violation involves an insurance default, the default is generally deemed incurable as a matter of law and a Yellowstone Injunction cannot be granted (*see, Boston LLC v 35 W. Realty Co. LLC*, 185 AD3d 508, 508 [1st Dept 2020] [in an action concerning the breach of the insurance provisions of a commercial lease: “Although Plaintiff otherwise met the criteria for obtaining a Yellowstone injunction, where the claimed default is not capable of cure, there is no basis for a Yellowstone injunction”]; *Bliss World LLC v 10 W. 57th St. Realty LLC*, 170 AD3d 401, 401-02 [1st Dept 2019] [Yellowstone Injunction denied in that tenant’s failure to procure proper insurance was “not susceptible to cure”]; *117-119 Leasing Corp. v Reliable Wool Stock, LLC*, 139 AD3d 420, 421 [1st Dept 2016] [“The motion court correctly determined that the tenant’s failure to obtain insurance was not curable”]).

Plaintiffs have submitted no meaningful evidence to the effect that they have procured, or can procure, the requisite amount of coverage retroactive to the period of time in which the

amount fell below the requisite level required under the leases. The most that plaintiffs have been able to do, or say, is to submit insurance binders showing prospective coverage in the requisite amounts (NYSCEF Doc. Nos. 26, 27) and an uncorroborated statement by an officer of plaintiffs that his insurance broker “has informed” him that he would be able to purchase retroactive coverage (*see*, NYSCEF Doc. No. 25 [Reply Affidavit of Zafar Ahmed] ¶ 6). No affidavit from that broker is submitted, nor is there any other independent proof – such as an insurance binder or policy – that such retroactive coverage is available to plaintiffs.

Thus, although plaintiffs claim that they are procuring new policies to provide for additional insurance, that cannot operate to nullify the indisputable fact that for all the time period that plaintiffs did not possess the required coverage, they were in breach of their leases and unable to avail themselves of the extent of insurance coverage required by the leases to insure any loss occurring prior to the effective date of their new policies. As the Appellate Division, First Department, held in *Rui Qin Chen Juan v 213 West 28 LLC* (149 AD3d 539, 540 [1st Dept 2017] [brackets in original]): “The failure to obtain insurance is a material breach that may not be cured by the purchase of prospective insurance, as such insurance ‘does not protect defendant [owner] against the unknown universe of any claims arising during the period of no insurance coverage.’” (*See also, Kyung Sik Kim v Idylwood, N.Y., LLC*, 66 AD3d 528 [1st Dept 2009].)

Plaintiffs suggest that defendant waived the right to enforce the leases by not asserting the deficiencies in coverage when they purchased the building in 2020 (*see*, NYSCEF Doc. No. 6 [Moving Affidavit of Zafar Ahmed] ¶ 23). A waiver is “an intentional relinquishment of a known right and should not be lightly presumed” (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]). In *Booston, supra*, the Appellate Division, First Department, affirmed

the motion court's denial of a Yellowstone Injunction which found that, in light of the non-waiver clause in the lease, the landlord could not, as a matter of law, be deemed to have waived a lease violation because the tenant had delivered copies of its insurance certificates for years without objection. In the instant case, paragraph 24 of the leases (NYSCEF Doc. Nos. 7, 8) is an express "No-Waiver" clause.

The final argument raised by plaintiffs is that the leases (NYSCEF Doc. Nos. 7, 8), at paragraph 8, give defendant the discretion to procure insurance and charge plaintiffs the cost of same as additional rent, and, therefore, the argument goes, defendant was somehow required to exercise that remedy and, in the absence of same, may not pursue a lease default based on plaintiffs' failure to maintain the requisite insurance coverage (*see*, Affirmation of Steven Landy, Esq. [NYSCEF Doc. No. 3], ¶ 5). However this argument has not been accepted by the Appellate Division (*see, e.g., 166 Enterprises Corp. v I G Second Generation Partners, LP*, 81 AD3d 154 [1st Dept 2011] [landlord was not required to exercise its option under the lease to obtain its own insurance and bill it to the tenant as additional rent]; *Jackson 37 Co., LLC v Laumat, LLC*, 31 AD3d 609 [2d Dept 2006] [rejecting defendant's contention that plaintiff should have exercised its alternative remedies under the lease]).

Accordingly, it is

ORDERED that the motion by plaintiffs for an injunction pursuant to *First Natl Stores, Inc. v Yellowstone Shopping Ctr., Inc.* (21 NY2d 630, *rearg denied* 22 NY2d 827 [1968]) (a "Yellowstone Injunction"), is denied; and it is further

ORDERED that the interim stay set forth in this court's order to show cause (NYSCEF Doc. No. 15) is hereby lifted; and it is further

ORDERED that a preliminary conference will occur at the Courthouse, 111 Centre Street, Room 1166, New York, New York, on February 18, 2022, at 2:00 p.m.

This will constitute the decision and order of the court.

ENTER:



<u>12/23/2022</u> DATE		<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<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