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| <b>Graphnet, Inc. v 30 Broad St. Venture, LLC</b>  |
| 2023 NY Slip Op 30075(U)   |
| January 9, 2023  |
| Supreme Court, New York County   |
| Docket Number: Index No. 151622/2021   |
| Judge: Alexander M. Tisch  |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ALEXANDER M. TISCH PART 18**

*Justice*

-----X INDEX NO. 151622/2021

GRAPHNET, INC.

Plaintiff,

MOTION DATE 03/03/2022,  
05/06/2022,  
05/05/2022

- v -

MOTION SEQ. NO. 002 003 004

30 BROAD STREET VENTURE, LLC,

Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for CONTEMPT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 71, 72, 73, 74, 75, 76, 77, 78, 79, 102, 104, 106, 108

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 82, 83, 84, 85, 86, 87, 88, 89, 90, 93, 97, 99, 100, 103, 105

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, defendant-landlord moves to hold plaintiff-tenant in civil contempt for its alleged willful violation of this Court’s decision and order dated 8/19/2021 resolving motion sequence no. 1 (NYSCEF Doc No 55 [the Order]); vacating the conditional *Yellowstone* injunction granted in the same Order; and granting attorneys’ fees (motion sequence no. 2). Plaintiff moves for leave to amend the complaint (motion sequence no. 3) and for leave to reargue and modify, or request clarification of, the same Order and to stay a determination of defendant’s motion pending determination of its reargument motion as well as a determination on the motion for leave to amend (motion sequence no. 4).

That branch of the motion for a stay is granted to the extent that the Court, in its discretion, determines the motion for leave to amend first and will then address the defendant’s

motion and plaintiff's reargument/clarification motion as they both concern the status of the *Yellowstone* injunction.

“Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Y.A. v Conair Corp.*, 154 AD3d 611, 612 [1st Dept 2017]). Here, the Court finds that the action is relatively at its infancy, as only a preliminary conference order has been issued and no meaningful discovery has taken place. Therefore, the Court finds no prejudice (see, e.g., *Antwerpse Diamantbank N.V. v Nissel*, 27 AD3d 207, 208 [1st Dept 2006] [“Despite the passage of a year since the filing of the original answer, there was no prejudice to plaintiff because of the lack of significant discovery or other progress in the case”]). Additionally, the Court finds that plaintiff met its minimal burden showing that the proposed amendments are not palpably insufficient on their face (see, e.g., *Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 365–66 [1st Dept 2007]).

In seeking civil contempt, defendant must demonstrate that (1) “a lawful order of the court clearly expressing an unequivocal mandate was in effect”; (2) “the order has been disobeyed”; (3) “the party charged must have had knowledge of the court’s order” (*Matter of Department of Env'tl. Protection of City of N.Y. v Department of Env'tl. Conservation of State of N.Y.*, 70 NY2d 233, 240 [1987]); and (4) that a right of a party “may be defeated, impaired, impeded, or prejudiced” by the mere disobedience of the order (*Hinkson v Daughtry-Hinkson*, 31 AD3d 608 [2d Dept 2006]). “A motion to punish a party for civil contempt is addressed to the sound discretion of the court, and the movant bears the burden of proving the contempt by clear and convincing evidence” (*El-Dehdan v El-Dehdan*, 114 AD3d 4, 10 [2d Dept 2013], *affd* 26 NY3d 19 [2015], quoting *Matter of Hughes v Kameneva*, 96 AD3d 845, 846 [2d Dept 2012] [internal quotations omitted]).

The application for contempt is predicated upon plaintiff's non-compliance with the Court's directive to place disputed rent in an escrow account. Specifically, the Order stated as follows:

"The Court finds it appropriate to grant the relief subject to the condition that plaintiff continue to place monthly rent in an escrow account pending the determination of this action, from April 2021 to the present and continuing pendente lite.

\* \* \*

"Accordingly, it is hereby . . . ORDERED that plaintiff's motion for a Yellowstone injunction is granted on the condition that it places rent from April of 2021 through the present in an escrow account and continues to place such rent in escrow pendente lite" (the Order).

Defendant argues that plaintiff should be held in contempt as it is undisputed that plaintiff did not put any monies in escrow per the Court's directive. Part of plaintiff's motion seeking reargument or modification, however, contends that the order failed to specify a specific date by which plaintiff was directed to fund the escrow and an appropriate escrow agent for the escrow account. Given the discrepancy in how the Order was interpreted by both sides, the Court cannot say with certainty that the Order expressed a clear and unequivocal mandate (see, e.g., Chambers v Old Stone Hill Rd. Assoc., 66 AD3d 944, 946 [2d Dept 2009] [civil contempt not found where the "order did not express a clear and unequivocal mandate to remove the original facility immediately or by a specific deadline"])). Because one of the elements for contempt cannot be established, that branch of defendant's motion to hold plaintiff in civil contempt is denied.

In support of the branch of plaintiff's motion to reargue or modify the Order, plaintiff argues that the Order failed to specify a date for plaintiff to comply with the directive, as noted above, and additionally argues that "Plaintiff's obligation to pay rent has not yet arrived and the Lease violates the rule against perpetuities and therefore there are no rents due under it" (NYSCEF Doc No 85 at ¶ 30). Given the Court's ruling on the leave to amend the complaint, the Court treat's plaintiff's motion as one for renewal because the new complaint significantly

changes the Court's analysis (see Vincent Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C2221:9B ["The courts are not bound by the label appended to the motion by a party and can designate a motion for renewal as one for reargument if it presents neither new facts nor a change in the law"]; see, e.g., Dorian v City of New York, 129 AD3d 445, 445 [1st Dept 2015]).

The Court reasoned in its prior decision and order that an essential element for the *Yellowstone* injunction was that the tenant demonstrated its willingness and ability to cure the default (see Order at 4). The Court relied upon plaintiff's representation that it wanted to avoid a forfeiture of the lease and could demonstrate its ability to cure the alleged default by, e.g., placing money in escrow (see id. at 5-6). Now, however, all of the claims in the amended complaint are premised upon the argument that the lease was null and void (see NYSCEF Doc No 106 at ¶ 16 [the "first cause of action" is for "declaratory relief [that] the Lease is void *ab initio*"]; id. at ¶¶ 21-24 [describing remaining causes of action based on the same]). Thus, in arguing that there is no lease, it is axiomatic that the plaintiff cannot sufficiently demonstrate its desire and willingness to maintain its leasehold (see Order at 6, discussing Broad Financial Center LLC v National Association of Security Dealers, Inc., 187 F Supp 2d 139, 139-41 [SDNY 2002]). Therefore, a *Yellowstone* injunction should not be granted.

The remaining branch of defendant's motion for attorneys' fees is denied for failing to specify the legal basis for the requested relief, aside from the civil contempt (see Jamie v Jamie, 19 AD3d 330 [1st Dept 2005]), which has been denied.

Accordingly, it is hereby ORDERED that plaintiff's motion for leave to amend the complaint herein is granted (motion sequence no. 3), and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further


ORDERED that the parties are directed to appear for a virtual compliance conference on Wednesday, **March 8, 2023** at 10:00 am via Microsoft Teams;<sup>1</sup> and it is further

ORDERED that the branch of plaintiff's motion for a stay of a determination of the defendant's contempt motion is granted in part as set forth herein (motion sequence no. 4); and it is further

ORDERED that the branch of the plaintiff's motion for reargument or clarification of the *Yellowstone* injunction (motion sequence no. 4) and that branch of defendant's motion to vacate the *Yellowstone* injunction (motion sequence no. 2) are granted to the extent that the Court considers the amended complaint as a basis for renewal and hereby vacates the *Yellowstone* injunction that was conditionally granted in the Order; and it is further

ORDERED that the balance of motion sequence no. 2 and 4, and any relief requested not addressed herein, are denied.

This constitutes the decision and order of the Court.

|                         |                          |                            |                          |        |  |                       |                          |           |
|-------------------------|--------------------------|----------------------------|--------------------------|--------|--|-----------------------|--------------------------|-----------|
| <u>1/9/2023</u><br>DATE |                          |                            |                          |        | <br>_____<br>ALEXANDER M. TISCH, J.S.C. |                       |                          |           |
| CHECK ONE:              | <input type="checkbox"/> | CASE DISPOSED              | <input type="checkbox"/> | DENIED | <input checked="" type="checkbox"/>  | NON-FINAL DISPOSITION | <input type="checkbox"/> | OTHER     |
| APPLICATION:            | <input type="checkbox"/> | GRANTED                    | <input type="checkbox"/> | DENIED | <input checked="" type="checkbox"/>  | GRANTED IN PART       | <input type="checkbox"/> | OTHER     |
| CHECK IF APPROPRIATE:   | <input type="checkbox"/> | SETTLE ORDER               | <input type="checkbox"/> |        | <input type="checkbox"/>   | SUBMIT ORDER          | <input type="checkbox"/> | REFERENCE |
|                         | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> |        | <input type="checkbox"/>   | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |

<sup>1</sup> Calendar invitation containing Teams link to be sent by Part 18 Clerk ([SFC-Part18-Clerk@nycourts.gov](mailto:SFC-Part18-Clerk@nycourts.gov)) to all parties of record on NYSCEF.