1516 Roof LLC v 469 Holdings, LLC
2023 NY Slip Op 30694(U)
March 8, 2023
Supreme Court, New York County
Docket Number: Index No. 653669/2022
Judge: Margaret Chan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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1516 ROOF LLC,

Plaintiff,

- v -

469 HOLDINGS, LLC,

Defendant.

INDEX NO. 653669/2022

MOTION DATE 10/06/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 22, 24, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 98

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

This action involves a dispute over development obligations in a 2017 commercial lease (the Lease) between plaintiff-tenant 1516 Roof LLC (Tenant) and defendant-landlord 469 Holdings, LLC (Landlord) for the roof (the Demised Premises) of real property located at 469 Seventh Avenue, New York, NY 10018 (the Building). Plaintiff now moves by order to show for preliminary *Yellowstone* relief (*First Nat. Stores, Inc. v Yellowstone Shopping Ctr., Inc.*, 21 NY2d 630 [1968]), or in the alternative for relief under CPLR 6301, to enjoin Landlord from terminating the Lease and to extend Tenant's time to cure alleged Lease defaults. Landlord opposes the motion. Oral argument was held on October 25, 2022, at which time Tenant and Landlord were authorized to file, respectively, a reply and sur-reply (NYSCEF # 98).

Background

The Lease obligates Tenant to do certain development work to modify an existing freight lobby area to create an entrance lobby on the 36th Street side of the Building. Paragraph 86 of the Lease provides for two existing freight elevators to be converted to passenger elevators so as to afford Tenant access to the Demised Premises (the Paragraph 86 Work) (NYSCEF # 4 – the Lease, ¶ 86 [A]). The Lease's development clause also requires Tenant to furnish and install finishes necessary to complete the new lobby (*id.*). Paragraph 86 requires (i) Landlord to provide Tenant with plans regarding the lobby's modification and (ii) Tenant to provide Landlord with plans regarding the furnishing and finishing work (*id.*). The parties agreed that the Paragraph 86 Work would be completed no later than March 1, 2019 (*id.*).

It is undisputed that the Paragraph 86 Work was not completed by the deadline. Landlord sent a Thirty Day Notice to Cure and of Termination dated September 8, 2022 (NYSCEF # 14 – the Notice to Cure). The notice stated:

> [I]n violation of paragraph 86 of the Lease, Tenant has failed to complete the work necessary to: (i) create an entrance lobby on the 36th side of the Building by modifying the freight lobby and to convert two (2) existing manual freight elevators to passenger elevators and (ii) to install finishes necessary to complete the new lobby pursuant to the plans submitted by Tenant to Landlord. . . . Tenant is hereby required to cure its defaults by filing and submitting all necessary plans to the Landlord related to the [Paragraph 86 Work] and complete [such work] on or before October 14, 2022.
>
> (NYSCEF # 14 at 1).

On October 6, 2022, Tenant filed its Complaint and its present motion. Tenant argues that it has met the *Yellowstone* requirements, including showing that it "has the desire and ability to cure the alleged default by any means short of vacating the premises" (NYSCEF # 18 – MOL at 8). Tenant blames Landlord for "unreasonably thwart[ing] [Tenant] from starting and completing the very work it complains" has not been performed (*id.* at 1). Specifically, Tenant indicates that it submitted plans before the parties even signed the Lease, which Landlord approved, but then Landlord refused to sign the demolition permit application needed to commence the work. Tenant asserts that it wants to and needs to perform because "without the elevators and lobby the roof cannot even be accessed nor used for any purpose, let alone a restaurant" (*id.* at 2).

In opposition, Landlord disputes that Tenant has demonstrated the desire and ability to cure the actual default raised by the Notice to Cure. Landlord alleges that Tenant's focus on the rooftop renovation work conflates rooftop work Tenant would like to do with the work Tenant needs to do, as directed by the Notice to Cure which has nothing to do with the roof (NYSCEF # 43 – Opp at 2). Landlord indicates that Tenant is "without a credible protest" as to the demolition permit as it allegedly has not identified any time Landlord refused to sign a demolition permit for the Paragraph 86 Work only (*id.* at 7). Landlord includes an affidavit of Landlord's architect, who posits that separate permits are necessary for the different scopes of work (NYSCEF # 33 – Jones Aff, ¶ 20). Landlord asserts that Tenant has not voiced a tangible plan to address the Paragraph 86 Work default, including demonstrating proof of Tenant's financial wherewithal.

In reply, Tenant asserts that the roof work is not optional but rather is required by the Lease (NYSCEF # 51 – Reply at 20). Tenant also points to the Lease terms respecting the Paragraph 86 Work, which has language indicating that the conversion of the two elevators to passenger elevators would be done "so as to afford Tenant access to the Demised Premises" (*id.* at 3). Tenant asserts that "it is impossible to install the new passenger elevators without demolishing and

replacing the existing elevator bulkhead on the roof" (*id.* at 4). Tenant files an affidavit of its architect, Daniel Montroy, who states that the existing two elevators at issue do not currently reach the roof but only the top floor, so the existing bulkheads would need to be replaced so the elevator can be extended, and that this work needs to be done "in the proper sequence" (NYSCEF # 53 – Montroy Aff, ¶ 6). Tenant laments that Landlord deliberately stood in the way of Tenant proceeding yet now asks the court to order Tenant to construct elevators which do not afford it access to the Demised Premises.

Tenant also reiterates its desire and ability to cure, which it posits is all that is present for *Yellowstone* adjudication. Tenant argues that the Notice to Cure is void in that it does not provide information as to how Tenant can cure the alleged violation (NYSCEF # 51 at 3, n 3). Moreover, Tenant contends that if an alleged default is not capable of being cured within the thirty-day notice to cure period, then Landlord's right to cancel is nullified so long as Tenant "shall have diligently pursued same to completion" (*id.* at 7, citing Paragraph 61 [B] of the Lease). Finally, Tenant ventures that Landlord was required to provide plans for the lobby renovation, which Landlord did not do.

In response, Landlord argues that Tenant's default is uncurable as the Lease specifically required the Paragraph 86 Work be completed "in any event, no later than March 1, 2019" (NYSCEF # 84 – Sur-Reply of Landlord at 4, quoting NYSCEF # 4, § 86 [A]). Landlord continues that even if Tenant's default were curable in nature, Tenant has not demonstrated a willingness or ability to cure because "absent from the entirety of Tenant's submissions in support of its motion is any willingness to undertake the [Paragraph 86 Work] separate from its desired roof work" (*id.* at 7). Landlord also disputes Tenant's financial ability to perform and faults Tenant for failing to demonstrate its purported financial ability (*id.* at 8).

The parties introduce various affidavits of the principals and their engineers and architects, as well as plans, permits, reports, photographs, estimates, and other information. Included therein are allegations of Landlord's professionals that Tenant illegally ripped out a freight elevator, that Tenant selected an unqualified construction manager, and that Tenant's plans failed to prepare building code compliant sprinklers (*see e.g.* NYSCEF # 33, ¶ 13, 17; NYSCEF # 36, ¶ 10-11).

Further, Tenant has separately filed a motion for partial summary judgment (MS 002), for declaratory relief that Tenant asserts would moot the present motion (NSYCEF # 99 – Nov 14, 2022 Letter). Landlord argues that Tenant's new motion improperly attempts to buttress the record for *Yellowstone* relief (NYSCEF # 126 – Dec 6, 2022 Letter at 2). The court does not now address the partial summary judgment motion except to authorize defendant to file a sur-reply as requested in its letter of December 6, 2022 (NYSCEF # 126).

Discussion

"A *Yellowstone* injunction maintains 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 Third Ave. Assocs.*, 93 NY2d 508, 514 [1999]). "[E]ntitlement to a *Yellowstone* injunction does not require that [a tenant] demonstrate a likelihood of success on the merits" (*New Deal Realty LLC v 684 Owners Corp.*, 204 AD3d 447, 448 [1st Dept 2022]).

> To obtain a *Yellowstone* injunction, a tenant must show 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 premise.

(*Id.*; *see also Audthan LLC v Nick & Duke, LLC*, 181 AD3d 503 [1st Dept 2020] [noting that the court has permitted tenants "to rely on a longer cure period under the lease where . . . there is evidence that the cure could not be effected in the shorter period, and that the tenant has made a diligent effort to cure"]).

The first three elements are not in dispute, and the court finds that Tenant has adequately demonstrated it is prepared and able to cure, including via its efforts to date to engage several professionals to accomplish the lease-required work. Landlord would have the court ignore any efforts Tenant has made toward developing the roof, interpreting the Lease as saying nothing about extending past the 16th floor to the roof (NYSCEF # 98 at 22:1-2). Landlord, however, fails to recognize that Paragraph 86 of the Lease requires elevators be converted "so as to afford Tenant access to the Demised Premises," which Tenant's expert contends requires demolition and replacement of the existing elevator bulkhead on the roof to extend the elevators beyond the 16th floor. Landlord's lamentation that Tenant conflates the roof and lobby work is therefore unavailing at this early stage.

Furthermore, Landlord is incorrect that Tenant has not expressed the *Yellowstone*-required preparation and ability to perform the Paragraph 86 Work; Tenant's principal Shavolian has affirmed: "In the event this Court determines that plaintiff is in default, plaintiff has the desire and ability to cure the alleged default by means short of vacating the Premises" (NYSCEF # 3 – Shavolian Aff, ¶ 24) (*see New Deal Realty LLC v 684 Owners Corp.*, 204 AD3d 447, 447 [1st Dept 2022] [finding sufficient for *Yellowstone* injunction that the tenant's managing member's affidavit provided that in the event the court determines tenant liable for the stated default, tenant is "ready, willing, and able to cure"]).[2] That Tenant disputes it breached the Lease and raises the connection between the roof work and the Paragraph 86 Work does not mandate denial of a *Yellowstone* injunction (*Boi To Go,*

[2] Landlord's reliance on *Cemco Restaurants, Inc. v Ten Park Ave. Tenants Corp.* (135 AD2d 461 [1st Dept 1987]) and *Linmont Realty, Inc. v Vitocarl, Inc.* (147 AD2d 618 [2d Dept 1989]), in which the applicable tenants failed to demonstrate their preparation and ability to cure, is therefore unavailing.

Inc. v Second 800 No. 2 LLC, 58 AD3d 482 [1st Dept 2009] ["Although denying responsibility for the defaults set forth in defendant's notice. . . plaintiff has nonetheless evinced a willingness to cure any defaults, if found by the court"]).

Landlord's argument that Tenant's breach is uncurable in the context of *Yellowstone* relief because of the March 2019 deadline is unavailing given Paragraph ¶ 61 (B) of the Lease (*see Audthan*, 181 AD3d 503; *JDM Washington St. LLC v 90 Washington St., LLC*, 200 AD3d 612 [1st Dept 2021]).

Landlord's argument that "[b]ecause Tenant provides no evidence that it has completed the work since the issuance of the Notice to Cure – or that it has even attempted to progress the lobby and elevator work required under the Lease – its request for a Yellowstone injunction should be denied" is unavailing (NYSCEF # 28, ¶ 20; *see Quik Park 808 Garage, LLC v 808 Columbus Com. Owner LLC*, 187 AD3d 488, 489 [1st Dept 2020] [in finding the tenant to have sufficiently demonstrated it was prepared and maintained the ability to cure, noting "we have never held that a tenant must take steps to cure an alleged default before there has been a determination that the lease was violated"]). Landlord's concern regarding Tenant's financial ability is also insufficient at this stage where Tenant's demonstration of effecting the work includes engaging several professionals (*see WPA/Partners LLC v Port Imperial Ferry Corp.*, 307 AD2d 234, 237 [1st Dept 2003] ("tenant need not at this juncture prove its ability to cure; rather, [t]he proper inquiry is whether a basis exists for believing that the tenant" has the ability to cure] [internal quotation marks omitted]).

As to Landlord's various critiques of Tenant's allegedly illegal freight elevator work, plans regarding sprinklers, and contractor selection, such issues are not properly resolved on a *Yellowstone* application (*see e.g. Prinkipas LLC v Charlton Tenants Corp.*, 193 AD3d 601 [1st Dept 2021] [affirming *Yellowstone* injunction and noting that the "disputed factual issues as to [tenant's] alleged violations of the lease will be resolved in the plenary action"]).

Landlord asserts that it will be damaged in the amount of an estimated $1,549,230 should Tenant fail to perform the lobby and elevator work (NYSCEF # 43 at 12). This is based on construction budgets to replace the two elevators for $1.2 million, modify the lobby for $295,030, and perform repair work for damage Tenant allegedly illegally caused for $54,200 (NYSCEF #'s 32; 42). Tenant argues that its investments in improvements of over $1.5 million, including the purchase of custom-made elevators for over $200,000, obviate the need for an undertaking (NYSCEF # 51 at 13, citing *WPA/Partners*, 307 AD2d at 237).

Following the grant of *Yellowstone* injunction, a court is to set an undertaking at an amount rationally related to the quantum of damages which the landlord would sustain in the event that the tenant is later determined not to have been entitled to the injunction (*61 W. 62nd Owners Corp. v Harkness Apartment Owners Corp.*, 173 AD2d 372, 373 [1st Dept 1991] [citing CPLR 6212 [b]). On commercial landlord-tenant matters, one aspect of damages includes "a delay in

receiving a market rate rent for the commercial space" (*London Paint & Wallpaper Co. v Kesselman*, 138 AD3d 632, 633 [1st Dept 2016]).

The court disagrees with Tenant that no undertaking should issue and Tenant's reliance on *WPA/Partners* is unavailing. There, it was undisputed that considerable value had already invested by the tenant in improvements on the property; here, Tenant only offers amounts of its expenditures, which it has failed to establish have improved the property, especially given that the custom-made elevators are currently being stored (NYSCEF # 78, ¶ 6). Meanwhile, Landlord mistakenly bases the undertaking on amounts to complete the lobby and elevator work rather than on damages caused by the grant of *Yellowstone* relief.

Considering the nominal amount of rent charged and the overall circumstances presented, the court determines that the posting of an undertaking in the amount of $250,000 is reasonable and adequate.

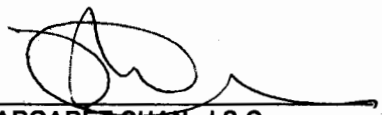
Conclusion

In light of the foregoing, it is

ORDERED that plaintiff 1516 Roof LLC's motion for a Yellowstone injunction is granted and defendant 469 Holdings, LLC is enjoined and restrained from taking any action to terminate the plaintiff's lease on the grounds set forth in defendant's September 8, 2022 Notice to Cure, and plaintiff's time to cure any default therein is tolled pending final adjudication of this litigation or further order of this court; and it is further

ORDERED that the undertaking is fixed in the sum of $250,000 conditioned that plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to defendant all damages and costs which may be sustained by reason of this injunction. Plaintiff shall post the undertaking within 30 days of service of this order with notice of entry; and it is further

ORDERED that the parties shall appear at a preliminary conference on Wednesday, March 29, 2023 at 11:30 a.m. via Microsoft Teams, or at such other time as the parties shall coordinate with the court's law clerk.



03/08/2023
DATE

MARGARET CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
	x	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE