

Marks v Ventura
2023 NY Slip Op 31861(U)
June 1, 2023
Supreme Court, Kings County
Docket Number: Index No. 513446/2023
Judge: Reginald A. Boddie
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At an IAS Commercial Term Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 1st day of June 2023.

P R E S E N T:

Honorable Reginald A. Boddie
Justice, Supreme Court

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SYLVIA MARKS,

Plaintiff,

Index No. 513446/2023

-against-

Cal. No. 6 MS 1

NELSON D. VENTURA, & AURORA M. VENTURA,

Defendants.

Decision and Order

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The following e-filed papers read herein:

NYSCEF Doc Nos.

MS 1

2-9, 11-15

Upon the foregoing papers, plaintiff's application for a *Yellowstone* injunction and/or a preliminary injunction is decided as follows:

On January 1, 2021, defendants as landlord, and plaintiff as tenant, entered into a ten-year lease for the commercial space (including basement) located at 494 Grand Street in Brooklyn, New York ("Premises"). The lease provides that the Premises was to be used for card reading and psychic purposes and may not be used for any other purpose unless with the prior written consent of landlord. On or about April 27, 2023, defendants' attorney served a notice of default upon plaintiff alleging that plaintiff violated the lease by utilizing the basement as a residential space. On May 5, 2023, plaintiff commenced this action against defendants for a judgment declaring that the notice is void, defective, or a nullity. In the alternative, plaintiff seeks sufficient time to cure

the alleged default. By the instant motion, plaintiff seeks a *Yellowstone* injunction staying and tolling the cure period in the notice of default, or a preliminary injunction restraining defendants from serving a new notice to cure, terminating the lease, or commencing any proceedings for possession of the Premises.

In support of her motion, plaintiff asserts that she holds a valid ten-year commercial lease and received a notice of default from defendants containing a ten-day cure period. Plaintiff contends that the notice is facially deficient as the notice was not signed by defendants. Rather, it was signed by defendants' attorney with whom plaintiff had never previously dealt. Additionally, plaintiff argues that, to the extent the court finds that a default exists, ten days to cure is insufficient as removal of fixtures requires obtaining permits from the city and the hiring of contractors.

In the alternative, plaintiff argues that she is entitled to a preliminary injunction. Plaintiff contends that there is no residential use of the basement insofar as (a) the claimed residential fixtures including a shower space existed prior to plaintiff's occupancy of the Premises; and (b) the shower space facilitates the use contemplated in the lease as plaintiff provides "psychic aura cleaning service," a process that involves applying various oils to a customer's body to allow for cleansing of the psychic aura. Plaintiff contends that in weighing the equities, without the imposition of a stay, she will suffer an irreparable injury of losing a valuable leasehold interest and being put out of business.

In opposition, defendant Aurora Ventura ("Aurora"), owner of the Premises, avers that (a) she found the following items in the basement: two twin beds, one king bed, one sofa bed, one inflatable mattress, a full kitchen with stove and refrigerator, one washer and dryer, a ninety-inch flatscreen TV, house furniture and clothing; (b) plaintiff never requested in writing to utilize the basement for residential purposes and no such permission was ever granted either explicitly or

implicitly; and (c) persons other than plaintiff or her customers were seen entering and exiting the basement. Aurora represents that the building is zoned for mixed-use and that the basement is solely for commercial usage. Defendants contend that permitting plaintiff to utilize the basement for residential purposes places them in violation of the building's certificate of occupancy, various government regulations, and property insurance terms. Defendants further contend that New York City Civil Court-Housing Division is the proper jurisdiction to bring this matter since this is purely a landlord/tenant dispute.

Discussion

The purpose of a *Yellowstone* injunction is to stop the running of the cure period of a tenant's alleged default, thereby protecting the tenant's investment in the leasehold and preserving the status quo until the parties' rights can be adjudicated (*Korova Milk Bar of White Plains, Inc. v PRE Properties, LLC*, 70 AD3d 646 [2d Dept 2010]). The requirements for obtaining *Yellowstone* relief are as follows: (1) plaintiff holds a commercial lease, (2) defendant has served a notice to cure, (3) the referenced cure period has not expired, and (4) plaintiff must demonstrate an ability and willingness to cure (*First Nat. Stores, Inc. v Yellowstone Shopping Ctr., Inc.*, 21 NY2d 630 [1968]).

Here, plaintiff established each of the requirements for a *Yellowstone* injunction. Plaintiff is a tenant occupying the Premises pursuant to a commercial lease. Defendants served a notice of default asserting that plaintiff breached the lease by using the basement as a residential space. Plaintiff's motion was made prior to the expiration period provided in the notice of default and plaintiff is willing and able to cure the alleged default by ceasing any residential use of the Premises.

As such, plaintiff's motion for a *Yellowstone* injunction is granted and same shall be contingent upon plaintiff ceasing any and all residential use of the basement within seven days of notice of entry of this decision. In addition, plaintiff shall post \$500 as an undertaking pursuant to CPLR 6312(b) within seven days of notice of entry of this decision.

ENTER:



Honorable Reginald A. Boddie
Justice, Supreme Court