

**Steven Bldg. Supply Inc. v Davrich Realty Corp.**

2023 NY Slip Op 32050(U)

June 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 512844/2023

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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STEVEN BUILDING SUPPLY INC.,

Plaintiff,

Decision and order

- against -

Index No. 512844/2023

DAVRICH REALTY CORP., CLAY PROPERTIES  
LLC, SOURCE RESIDENTIAL LLC, LEE  
HYMOWITZ, Esq., as Escrowee, and STEVEN  
HELLER, individually,

Defendant,

June 20, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1

The plaintiff has moved seeking a Yellowstone injunction and to consolidate this case with another case. The defendants have opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

On May 1, 1996 the defendant Davrich Realty Corp., [hereinafter 'Davrich'] was assigned all rights in a lease concerning property located at 19 Clay Street in Kings County. On February 9, 2018 the plaintiff Steven Building Supply Inc., [hereinafter 'Steven'] entered into a two year sublease with Davrich with an option to renew. Thus, the sublease provided that the "landlord shall have the right to cancel upon 120 days notice-during term of the lease or any extensions or options. Subtenant shall have an option to renew the sublease for an additional 2 years period at a monthly rate of \$1,500-per month. Any additional or subsequent extensions will be at a 3% increase

per annum" (see, Sublease ¶ 2 [NYSCEF Doc. No. 6]). The subtenant Steven exercised the renewal option commencing January 2020. In January 2022 Steven once again sought to exercise the renewal option and agreed to a three percent increase pursuant to the terms of the lease. According to the complaint Davrich refused to accept those payments and likewise never served any notice to terminate the subtenancy (see, Verified Complaint, ¶32 [NYSCEF Doc. No. 1]). A notice to terminate was thus served upon the plaintiff on December 22, 2022 listing the termination date as of May 11, 2023. The plaintiff has now moved seeking a Yellowstone injunction arguing the termination notice served is improper.

#### Conclusions of Law

A Yellowstone injunction is a remedy whereby a tenant may obtain 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, 693 NYS2d 91 [1999], First National Stores v. Yellowstone Shopping Center Inc., 21 NY2d 630, 290 NYS2d 721 [1968]). For a Yellowstone injunction to be granted the Plaintiff, among other things, must demonstrate that "it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises" (Graubard, supra).

Thus, a tenant seeking a Yellowstone must demonstrate that: (1) it holds a commercial lease, (2) it has received from the landlord a notice of default, (3) its application for a temporary restraining order was made prior to expiration of the cure period and termination of the lease, and (4) it has the desire and ability to cure the alleged default by any means short of vacating the premises (see, Xiotis Restaurant Corp., v. LSS Leasing Ltd. Liability Co., 50 AD3d 678, 855 NYS2d 578 [2d Dept., 2008]).

Section 3.2 of the sublease states that Steven as the "subleasee shall have the right to accept any bona fide offer made to Davrich Realty Inc., within 7 days after receipt of notice via email to subleasee and their attorney Razis and Ross P.C. from Davrich of said offer. Subleasee must enter into a contract with a 10% deposit within 7 days from its acceptance and must close under the same terms and conditions as were transmitted by outside offer and close 21 after contract-time being of the essence" (see, Sublease ¶ 3.2 [NYSCEF Doc. No. 6]).

Steven argues that they were never made aware of any offers between Davrich and any third parties and that consequently, they were never really given the proper right of first refusal. Thus, they seek a Yellowstone injunction staying the termination of the sublease and demand an opportunity to exercise the option contained within the sublease.

The defendants counter that the sublease was terminated December 31, 2021, thus no exercise of the option was even possible. Indeed, in an email dated February 7, 2022 counsel for Davrich and defendant Lee Hymowitz Esq., responded to the plaintiff's claims they were denied the right of first refusal. The email stated that "as you well know your clients original lease expired December 31, 2019 and then was extended until December 31, 2021. As of December 31, 2021 if your client wanted to remain in the property you or he should have started negotiations for a new lease" and that "your client is now a holdover tenant and has no rights under the prior lease" (see, Email dated February 7, 2022, 10:06 AM [NYSCEF Doc. No. 48]). This is true, argue the defendants, because they assert the plaintiff was only entitled to one extension. The defendants assert that the language contained within paragraph 2 of the sublease that "[a]ny additional or subsequent extensions will be at 3% increase per annum" does not grant the right to SBS for automatic two year renewals under the Sublease" (see, Memorandum of Law, page 6 [NYSCEF Doc. No. 61]). Rather, that clause merely means that "in the event the parties came to an agreement for a new lease extension, the agreed upon base rent would not be the same for the entire extension period but would there [sic] will be 3% increases per annum. For example, if the parties came to an agreement to a two-year lease extension from January 2022 to

December 21, 2023, for a base rent of the first year of the extension of \$2,000, the second year of the extension would not be \$2,000 but would reflect a 3% increase per annum to \$2,060" (id). However, it strains credulity to argue the reference in the lease to "additional or subsequent extensions" really meant a new lease that required negotiation but the reference in the same paragraph to a three percent raise per annum acted to frame the rental amounts of such new lease. There is no basis to assert that after one extension the parties would be required to negotiate a new lease subject to rental terms stated in an old lease. There is no explanation why the parties would be required to negotiate all the terms of a new lease, save the rental amount, arguably the most critical component of any lease. There is no reason offered why the rental amount could not be negotiated by the parties when contemplating a 'new' lease and why such negotiations would be restricted by language in an old lease. Moreover, if true that the plaintiff was only entitled to one extension then the language in the lease that the "landlord shall have the right to cancel upon 120 days notice during the term of the lease or any extensions or options" really makes no sense. Thus, the plain and obvious meaning of paragraph 2 is that the landlord may send a termination notice by providing 120 days notice or the plaintiff may renew the lease without further negotiation by providing an increase of rent as outlined

in the sublease. The defendant's explanation of the lease, ignoring the plain language and implications of such plain language of the lease is categorically rejected. Indeed, no interpretive method of any contract could reasonably assert the sublease forbade more than one extension and that language which clearly contemplates such extension refers to terms of a future lease not yet even negotiated. Therefore, as a matter of law, the plaintiff validly exercised the lease extension option and was in valid possession of the lease when Clay/Source purchased the premises.

Clay/Source argues that in any event they purchased the property with the understanding that Steven's interest in the premises had been terminated and that consequently they are a bona fide purchaser for value. If that is true then Steven only maintains an action against Davrich which would demand a denial of the Yellowstone request. However, there are surely questions of fact which cannot be decided at this time whether Clay/Source knew of Steven's status or whether such reliance on the representation the sublease expired at the end of 2021 was reasonable. Idan Shitrit, a manager of Clay and Source submitted an affidavit that states Davrich "advised" Clay/Source the Steven sublease was expiring on December 31, 2021 (see, Affidavit of Idan Shitrit, ¶ 12 [NYSCEF Doc. No. 32]). Further, the affidavit asserts that Davrich had been negotiating with Steven regarding

the purchase of the property and that after such negotiations broke down Clay/Source purchased the premises (see, Affidavit of Idan Shitrit, ¶ 21 [NYSCEF Doc. No. 32]). Further, the affidavit indicates the premises was inspected by Source and that there did not appear to be any tenant engaged in any work at the premises supporting the belief the tenant had already abandoned the property (see, Affidavit of Idan Shitrit, ¶¶ 29, 30 [NYSCEF Doc. No. 32]). While that might contradict the assertion contained a mere three paragraphs earlier that "Davrich further represented that - no extension having had been negotiated - SBS was a holdover tenant that would need to be evicted from the Premises" (see, Affidavit of Idan Shitrit, ¶ 27 [NYSCEF Doc. No. 32]) since eviction is only required if there is no abandonment, there are surely questions whether Clay/Source's belief concerning the status of Steven's sublease hold was reasonable. Further discovery is necessary to determine whether in fact Clay/Source can be deemed a bona fide purchaser making Steven's request to the right of first refusal an impossibility.


Therefore, based on the foregoing, the request for a Yellowstone is granted. The only issue that must be resolved is whether Clay/Source's purchase in light of Steven's interests satisfies the requirements of a bona fide purchaser. The Yellowstone is granted pending resolution of that issue. Further motion practice concerning this matter may be filed at any time.

Lastly, the companion action entitled *Steven Building Supply Inc., v. Darvich Realty Corp., et. al.*, Index Number 518092/2022 concerns the same facts and circumstances as this case. It involves a claim for breach of contract by failing to abide by the right of first refusal clause contained in the sublease. The assertion that a motion to dismiss will ultimately be filed is not a basis to oppose consolidation where such consolidation appears appropriate. Therefore, based on the foregoing, the motion seeking consolidation is granted. The merits of the companion are deeper than the mere question whether Clay/Source can be considered a bona fide purchaser for value since the breach of contract claim seeks more than just the ability to exercise the right of first refusal. In any event, such lawsuit is sufficiently connected to this action to merit consolidation.

So ordered.

ENTER:

DATED: June 20, 2023  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC