

**170 Tillary Corp. v Gold Tillary Realty LLC**

2023 NY Slip Op 32724(U)

August 1, 2023

Supreme Court, Kings County

Docket Number: Index No. 510354/2022

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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170 TILLARY CORP.,

Plaintiff,

Decision and order

- against -

Index No. 510354/2022

GOLD TILLARY REALTY LLC,

Defendant,

August 1, 2023

-----X  
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #3

The plaintiff has once again moved seeking a Yellowstone injunction. The plaintiff has further moved seeking to amend the complaint. The defendant has opposed the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

As recorded in prior orders, on October 7, 1999 the plaintiff tenant entered into a lease with landlord concerning the rental of space located at 170 Tillary Street in Kings County. A notice to cure was served on May 8, 2023 alleging one default, namely the failure to pay water and sewer charges through May 2023 and real estate taxes and rent from November 2021 through May 2023. On September 19, 2022 the court granted a Yellowstone regarding a default served on December 23, 2021 which alleged the failure to pay water and sewer charges through December 2021 and late fees for sixteen months commencing January 2020 through November 2021. While the actual default notice called the missing payments 'late fees' the actual motion papers referred to them as rent. Thus, Tibor Hersko, a member of the

defendant submitted an affidavit that stated "with respect to the rent demand, there is no basis to stay the Plaintiff's obligations" (see, Affidavit of Tibor Hersko, ¶22 [NYSCEF Doc. No. 25]). Further, the arguments opposing the first Yellowstone request repeatedly termed the disputed payments as rent (see, Affirmation in Opposition, ¶¶29,30,32 [NYSCEF Doc. No. 24]). However, in fact, the amounts contained in that first default notice was not base rent. This is confirmed by the fact the monthly rental fee began at \$28,33.33 when the lease was first executed in 1999 (see, Rider to Lease, ¶2 [NYSCEF Doc. No. 6]). Of course, increases over the ensuing years have only increased that amount. Thus, the amounts contained in the second notice to cure is not base rent. In any event the defendant argues the plaintiff is not entitled to a Yellowstone injunction because the lease itself terms the additional rent as rent and the nonpayment of rent is not something for which a Yellowstone may be granted. The plaintiff seeks a Yellowstone and argues the cure period should be tolled until the matter is resolved in the course of litigation. Moreover, the plaintiff seeks to amend the complaint to assert claims concerning the second notice to cure that is the subject of this motion.

Article 4A(iv) of the lease rider states that "the term 'Rent' shall mean the base annual rental, as incurred, for the second year of the original lease term or of each and every

subsequent two-year period during the term of this lease as same shall be applicable, as the lease term progresses" (id). The rider to the lease explains that in addition to rent, the tenant must also pay 'additional rent' which is calculated utilizing an index contained in the lease. Indeed, the rider provides examples how such 'additional rent' should be calculated. Thus, clearly, the lease contemplates additional rent as distinct from the base rent. The defendant points to Article 26(b) of the lease rider as proof the additional rent is also termed rent. Article 26(b) states that "all payments other than the base annual rental to be made by Tenant pursuant to this Lease shall be deemed additional rent and, in the event of any non-payment thereof, Landlord shall have all rights and remedies provided for herein or by law for nonpayment of rent" (see, Rider to Lease, ¶26(b) [NYSCEF Doc. No. 6]). The defendant argues that "as such, any sums due under the Lease can only fall in one of two categories: they are either base rent, or, if they are not base rent, then they are additional rent. As such, the entirety of the amounts sought in the Rent Demand can only be defined as either base rent or additional rent" (see, Memorandum of Law in Opposition, page 6 [NYSCEF Doc. No. 110]). While that is true the very next sentence of Article 26(b) clearly differentiates between the two. The article continues and states that "Tenant shall have thirty (30) days from its receipt of any additional

rent statement to notify Landlord, by certified mail, return receipt requested, or Federal Express or Express Mail or equivalent that it disputes the correctness of any such statement. After the expiration of such thirty (30) day period, such statement shall be binding and conclusive upon Tenant" (id).

Of course, no such ability to dispute the base rent exists. Therefore, while any additional rent might be classified as 'rent' such classification does not insulate it from challenge.

In any event, notwithstanding the different classifications of these types of rent, the plaintiff is entitled to a Yellowstone injunction. The defendant argues that a Yellowstone is improper where the nonpayment of rent is the basis of the notice to cure. While that may be true in some contexts it is subject to limitation. Thus, in Lexington Ave. & 42<sup>nd</sup> Street Corp., 380 Lexchamp Operating Inc., 205 AD2d 421, 613 NYS2d 402 [1<sup>st</sup> Dept., 1994] the court explained that "Plaintiff, rather than commencing a non-payment proceeding pursuant to RPAPL §711(2), which would have allowed defendant to cure at any time prior to the issuance of a warrant of eviction (RPAPL §751[1]), instead chose to serve a notice to cure, a predicate notice to a holdover proceeding, alleging that non-payment was a breach of a substantial lease obligation. This would have allowed the termination of the lease, effectively eradicating defendant's interest in the leasehold, prior to the full adjudication of the

parties' rights. As a result, a Yellowstone injunction was warranted to preserve the status quo" (id). Consequently, where a notice to cure, even about rent, is served as opposed to a notice of nonpayment then a Yellowstone is proper (Purdue Pharma, LP v. Ardsley Partners LP, 5 AD3d 654, 774 NYS2d 540 [2d Dept., 2004]). The Yellowstone injunction insures that all the tenant's rights are adequately protected (see, Trump on the Ocean LLC v. Ash, 81 AD3d 713, 916 NYS2d 177 [2d Dept., 2011]). Thus, in DHB Industries Inc., v. West-Post Management Company, 9 Misc3d 1130(A), 862 NYS2d 807 [Supreme Court Nassau County 2005] the court granted a Yellowstone injunction to the tenant DHB. The court explained that "a landlord who has a commercial tenant that is not paying rent may bring a nonpayment proceeding pursuant to Real Property Actions and Procedure Law §711(2). Alternatively, the landlord may chose to treat the tenant's failure to pay rent as a breach of a substantial provisions of the lease, serve the tenant with a notice of default or notice to cure, and if the tenant fails to cure, terminate the lease and bring a holdover proceeding pursuant to Real Property Actions and Procedure Law §711(1)...If the landlord chooses to serve the tenant who has not paid rent with a notice of default or notice to cure, the tenant may obtain a Yellowstone injunction...Since West-Post has opted to proceed by serving DHB with a notice of default indicating that the lease would be terminated if DHB did not cure the

default on or before September 30, 2005, so as to terminate of the lease and bring a holdover proceeding, DHB can obtain a Yellowstone injunction" (id).

The cases cited by the defendant do not demand a contrary result. M.B.S. Love Unlimited v. Jaclyn Realty Associates, 215 AD2d 537, 626 NYS2d 504 [2d Dept., 1995] and Top-All Varieties v. Raj Development Company, 151 AD2d 470, 542 HYS2d 259 [2d Dept., 1989] both held Yellowstone injunctions unavailable where the landlord served a rent demand (Top-All) or the landlord served a statutory notice as a prerequisite to a summary nonpayment proceeding (M.B.S.). In neither case did the landlord serve a notice to cure. Hollymount Corp., v. Modern Business Associates, 140 AD2d 410, 528 NYS2d 113 [2d Dept., 1988] which did involve a notice to cure for the nonpayment of rent explained that a Yellowstone is improper when sought following a notice to cure for the nonpayment of rent. However, the court qualified the denial by noting that "these violations do not require the protections of a Yellowstone injunction as rent nonpayment proceedings, which are separate from holdover summary proceedings...carry their own distinct cure provisions. Indeed, RPAPL 751(1) enables a tenant found to be in default in payment of his rent to deposit the rent with the court or to pay the landlord directly within 10 days of the judgment, thereby staying issuance of a warrant of removal and thus preserving the tenancy"


(id). Thus, to the extent that case involved a notice to cure it further involved a rent nonpayment proceeding, a safeguard inapplicable in this case.

Therefore, where a notice to cure is served and includes the failure to pay rent then a Yellowstone is an appropriate remedy to toll the cure period. Thus, based on the foregoing, the motion seeking a Yellowstone injunction is granted. Further, the motion seeking to amend the complaint is granted. The motion seeking to declare the notice to cure null and void is denied.

So ordered.

ENTER:

DATED: August 1, 2023  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC