

Mister French NYC, LLC v 24 E 21 COMM, LLC

2023 NY Slip Op 33527(U)

September 30, 2023

Supreme Court, New York County

Docket Number: Index No. 652544/2022

Judge: Verna L. Saunders

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no dispute that rent sought remains unpaid and plaintiff is withholding same in violation of the lease, and moreover, has failed to show that it is ready, willing, and able to cure the default.

To establish entitlement to a preliminary injunction, its proponent bears the burden of demonstrating “(1) a likelihood of ultimate success on the merits, (2) irreparable injury absent granting of the preliminary injunction, and (3) a balancing of the equities in the movant’s favor.” (*St. Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d 347, 348 [1st Dept 2003]; see *Balay v Manhattan 140 LLC*, 204 AD3d 491, 494 [1st Dept 2022].) “It is well settled that the ordinary function of a preliminary injunction is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits.” (*Spectrum Stamford, LLC v 400 Atl. Tit., LLC*, 162 AD3d 615, 616 [1st Dept 2018] [citations omitted].) (*St. Paul Fire & Mar. Ins. Co. v York Claims Serv.*, 308 AD2d at 348.) The decision to grant or deny a preliminary injunction rest within the sound discretion of the trial court. (see *Gilliland v Acquafredda Enters., LLC*, 92 AD3d 19, 24 [1st Dept 2011]).

A party requesting a *Yellowstone* injunction must demonstrate that it holds a commercial lease; received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; requested injunctive relief prior to the termination of the lease; and is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises (see *Sagi Rest. Corp. v Brusco W. 78th St. LLC*, 2014 NY Slip Op 30626[U] [Sup Ct, NY County 2014], citing *Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Associates*, 93 NY2d 508 [1999]). 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 lease forfeiture (*Graubard, supra*, 93 NY2d at 514).

Here, after considering the moving papers, together with the post oral argument submissions, the motion is granted. It is undisputed that there exists a commercial lease between the parties, that a ten-day notice of default and opportunity to cure (NYSCEF Doc. No. 7) was issued by defendant as against plaintiff for the alleged failure to timely pay “Post Free Rent Period Arrears”, and finally, that plaintiff timely sought a temporary restraint before the expiration of the cure period. What is contested is whether tenant is prepared and maintains the ability to cure the alleged default alleged herein. Plaintiff maintains that it is ready, willing and able to cure but further, that the status quo should be maintained inasmuch as defendant’s demand for alleged rental arrears and thus, the articulated basis for lease termination is not provided for in the lease.

In response, defendant claims that there is no bona fide dispute that plaintiff is in violation of the lease for failing to pay rent arrears and improperly seeks an extension of the cure period by seeking a *Yellowstone* injunction. Relying on Paragraph 2(C) of the lease which disallows any setoffs or deductions; and Article 52 of the lease, the “No Abatement” provision, defendant argues that plaintiff’s purported defenses do not lie and thus, no bona fide dispute exists. Moreover, defendant asserts that Article 13(B), the casualty provision of the lease and Article 53, defendant’s responsibility for gross negligence, do not constitute a basis for relief insofar as the defendant does not control the residential portion of the premises from whence the

leaks emanated, but that the condominium is in control of said area. Finally, defendant contests plaintiff's assertion that it is readily able to cure the default.

Here, while the parties contest the interpretation of the lease provisions above, the submissions of the parties, including the rent ledger (NYSCEF Doc. No. 26) indicate that various payments were tendered in July 2022 and August 2022. Further, the dispute as to the payments allegedly due and owing concern "Post Free Rent Period Arrears" accruing after a period of "Free Rent" was canceled. Defendant maintains that the Free Rent period was rendered null and void upon plaintiff's alleged non-payment. Plaintiff's contention that due to the massive flooding of the premises and defendant's foreknowledge of massive construction issues relating to the space defendant's cancellation of the Free Period" (and, by extension, its ensuing claim for "Post Free Rent Period Arrears") is violative of the parties' lease agreement. The sworn affidavit of plaintiff's principal and the accompanying exhibits, as well as, the affidavit of defendant, support, in part, plaintiff's claim that the premises suffered leaks. And, while the nature and extent of the leaks is disputed, as is the responsible party for repair, the Director of Operations for defendant's Property Manager, Yechezkel Berman, acknowledges that leaks occurred, that it notified the residential portion of the condominium which retained a restoration company for repair. (See NYSCEF Doc. No. 17, *Berman affidavit at ¶¶ 12-16.*) So, even though defendant disputes that the leaks were a latent defect in the property, a bona fide dispute exists as to whether the defendant is in violation of the lease. Thus, the court determines that plaintiff has demonstrated its entitlement to the relief requested in that the status quo should be maintained until the parties have had a full and fair opportunity to litigate the instant matter.

The court further determines that plaintiff shall pay the ongoing use and occupancy monthly, no later than the 10th day of each month, without prejudice. Additionally, it is appropriate that under the circumstances plaintiff shall post an undertaking in the amount of \$133,388.73.

Finally, the plaintiff has cured any defect concerning Limited Liability Law Section 206. Thus, defendant's request that the matter should be dismissed on this basis is denied (See *Meltzer v Kentucky Hi Tech Greenhouses LLC*, 2023 NY Slip Op 30124 [U], [Sup Ct, NY County 2023]). All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that the court grants plaintiff Mister French NYC, LLC's order to show cause for a *Yellowstone* injunction to the extent that the court orders that the period of time in which plaintiff may cure any alleged default of its obligations as a commercial tenant under the subject lease is tolled pending the outcome of this action and the court enjoins and restrains defendant 24 E 21 Comm, LLC and its agents and/or representatives, from taking any steps to terminate plaintiff's tenancy and from commencing any action or proceeding to terminate said lease or remove plaintiff from possession of the subject premises or interfering with plaintiff's possession of said premises during the pendency of this action; and it is further

ORDERED that the court fixes an undertaking in the sum of \$133,388.73 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; and it is further

ORDERED that the parties must appear for a preliminary conference on November 29, 2023, details which shall be provided by the Court no later than November 27, 2023; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant.

This constitutes the decision and order of the Court.

September 30, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	