

23 Winehouse LLC v 1890 Adam Clayton Powell LLC
2023 NY Slip Op 33664(U)
October 18, 2023
Supreme Court, New York County
Docket Number: Index No. 150013/02023
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

23 WINEHOUSE LLC

Plaintiff,

- v -

1890 ADAM CLAYTON POWELL LLC,

Defendant.

-----X

INDEX NO. 150013/2023

MOTION DATE 04/03/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 28, 29, 30, 31 were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

In this action for, *inter alia*, a judgment declaring the parties' rights and obligations under a commercial lease and subsequent lease modification, the plaintiff tenant, which operates a restaurant on the subject premises, moves for a *Yellowstone* injunction (First National Stores, Inc. v Yellowstone Shopping Center, Inc., 21 NY2d 630 [1968]), to stay termination of the lease and to enjoin the defendant landlord from commencing or continuing any attempts to evict the plaintiff from the leased premises pending determination of the action.

The defendant alleges that the plaintiff has defaulted on its lease obligations by accruing rent arrears and generating excessive noise from the restaurant and argues for denial of any injunction or, should that relief be granted, that it be conditioned on the plaintiff paying all rent arrears, or posting a bond in that amount, plus use and occupancy. The defendant contends that the plaintiff began defaulting in rent and additional rent payments in May of 2021, three months after execution of the lease modification, and accrued approximately \$100,000 as of January 2023.¹ The plaintiff maintains that any noise emanating from the restaurant is not excessive or is generated by another tenant and denies any arrears.

¹ The defendant has commenced a breach of contract action against three guarantors on the lease, which action is pending in this court before another Justice. *1890 Adam Clayton Powell LLC v Laura Testa, Daniela Petix-Guadino and Fall Fara a/k/a Fara Fall*, 156602/2022.

A TRO was granted by the Appellate Division First Department, in an order dated January 26, 2023, restraining the defendant from taking any further action to terminate the lease between the parties, pending disposition of the plaintiff's motion. After oral argument on the motion, this court issued an order dated March 8, 2023, stating:

ORDERED that "the parties having expressed a desire to resolve this matter without further litigation, the plaintiff shall, on or before March 15, 2023, provide to the defendant a written proposed plan to minimize noise levels in the subject commercial unit, and it is further

ORDERED that counsel and the parties shall meet and confer regarding the proposed plan, at the subject premises if possible, on or before March 22, 2023, and it is further

ORDERED that the defendant shall approve, but not reasonably withhold approval of, any proposed construction or renovation work intended to minimize noise level, including the installation of "acoustical ceiling panels" as proposed by plaintiff's counsel.

The parties thereafter pursued resolution in this manner, and conferenced with this court, but no final settlement was reached.

The purpose of a *Yellowstone* injunction is to maintain the *status quo* so that the tenant served with a notice to cure an alleged lease violation may challenge the propriety of the landlord's notice while protecting a valuable leasehold interest. See Garland v Titan W. Assocs., 147 AD2d 304 (1st Dept. 1989) citing First National Stores, Inc. v Yellowstone Shopping Center, Inc., supra. The grant of *Yellowstone* relief tolls the running of the cure period so that in the event of an adverse determination on the merits the tenant may still cure the defect and avoid a lease forfeiture. See Post v 120 E. End Ave. Corp., 62 NY2d 19 (1984). When granting a *Yellowstone* injunction courts have generally accepted less than the showing normally required for the grant of preliminary injunctive relief. See id.

The applicant for a *Yellowstone* injunction must establish 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 premises.” Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc., 93 NY2d at 514, quoting 225 E. 36th Street Garage Corp. v 221 E. 36th Owners Corp., 211 AD2d 420, 421 (1st Dept 1995). “These standards reflect and reinforce the limited purpose of a *Yellowstone* injunction: to stop the running of the applicable cure period.” Id. As such, it has further been held that a *Yellowstone* injunction is inappropriate where the cure period has expired. See 166 Enterprises Corp. v I G Second Generation Partners, L.P., 81 AD3d 154 (1st Dept. 2011). Moreover, it is well settled that a plaintiff need not admit responsibility for the alleged default set forth in a notice to cure in order to establish entitlement to relief under *Yellowstone*, provided that the plaintiff remains willing and able to cure, should a default be found. See Artcorp Inc. v Citirich Realty Corp., 124 AD3d 545 (1st Dept 2015); Boi To Go, Inc. v Second 800 No. 2 LLC, 58 AD3d 482 (1st Dept 2009).

Here, it is undisputed that the plaintiff holds a commercial lease and received a notice of default from the defendant dated December 5, 2022, satisfying the first and second elements. The plaintiff also establishes that it requested injunctive relief prior to the termination of the lease, as the instant motion for a *Yellowstone* injunction was filed on January 5, 2023. The plaintiff has also shown that it has the ability to cure the default by reducing the noise level emanating from the leased premises by means such as improving the soundproofing system, relocating speakers and limiting opening hours, and has already begun to implement and test some measures. Indeed, as stated by the Appellate Division, the parties “expressed a desire to resolve this matter without further litigation.” Any unpaid arrears still owing may also be cured by payment if not previously paid or disposed of in the Civil Court non-payment proceeding commenced by the landlord (LT-308483-2021/NY).

While the court’s grants the *Yellowstone* injunction, it does so on the condition that the plaintiff pay into an escrow account the unpaid rent demanded by the defendant through the date of the motion, \$100,000, and pay use and occupancy to the defendant going forward.

Section 220 of the Real Property Law provides that “[t]he landlord may recover a reasonable compensation for the use and occupation of real property” per an agreement other than a deed. Further, “[a] court has broad discretion in awarding use and occupancy *pendente lite* (Alphonse Hotel Corp. v 76 Corp., 273 AD2d 124 [1st Dept, 2000]).” 43rd Street Deli v

Paramount Leasehold, L.P., 107 AD3d at 501 (1st Dept. 2013). “In determining the reasonable value of use and occupancy, the rent reserved under the lease, while not necessarily conclusive, is probative (Beacway Operating Corp. v Concert Arts Society, 123 Misc 2d 452, 453 [Civ Ct, NY County 1984]; see also Eli Haddad Corp. v Redmond Studio, 102 AD2d 730, 731 [1st Dept. 1984]).” Mushlam, Inc. v Nazor ,80 AD3d 471, 472 (1st Dept. 2011). Under the circumstances presented, including the monthly rent provided in the original lease, the court sets the monthly use and occupancy rate as \$4,000.00.

Accordingly, it is hereby,

ORDERED that plaintiff's motion for a *Yellowstone* injunction is granted; and it is further,

ORDERED that, pending final adjudication of this matter, the defendant is hereby enjoined and restrained from terminating or cancelling the plaintiff’s lease or from taking any further action to evict the plaintiff from the premises based upon noise emanating from the leased premises as per the December 5, 2022, default notice, on the conditions that (1) within 30 days of service of a copy of this order with notice of entry, the plaintiff shall pay into an interest bearing escrow account, to be maintained by the plaintiff’s attorney, \$100,000, the demanded unpaid rent through the date of the motion, January 5, 2023, and that (2) the plaintiff is directed to pay monthly use and occupancy of \$4,000.00, commencing November 1, 2023, and continuing until the matter is disposed or until a further order of this court, and it is further

ORDERED that counsel shall appear for a preliminary conference November 16, 2023, at 12:00 pm., to be conducted via Microsoft Teams, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

10/18/2023
DATE



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
 GRANTED DENIED GRANTED IN PART OTHER