

**L.I. Champions Taekwondo Inc. v 151 Montague  
Opportunity LLC**

2023 NY Slip Op 34218(U)

November 30, 2023

Supreme Court, Kings County

Docket Number: Index No. 522838/2023

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8  
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L.I. CHAMPIONS TAEKWONDO INC.,  
Plaintiff, Decision and order

- against - Index No. 522838/2023

151 MONTAGUE OPPORTUNITY LLC,  
Defendant, November 30, 2023

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1

The plaintiff has moved seeking a Yellowstone injunction. 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.

On April 11, 2022 the plaintiff tenant entered into a lease with landlord concerning the rental of space located at 151 Montague Street in Kings County. The rental space is utilized as a martial arts studio. A notice to cure was served on July 24, 2023 alleging, essentially, one default, namely that the tenant engages in excessive noise and vibrations which disturb the other tenants including a retail optical store, Cohen Fashion Optical Store, on the first floor. The notice to cure was accompanied with an expert report detailing the noise and vibration levels taking place at the premises. The plaintiff has moved seeking a Yellowstone injunction arguing either the noted defaults are baseless or that in any event they can readily be cured. As noted, the defendant opposes the motion.

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]).

Thus, the plaintiff does not assert that it unequivocally is unwilling to cure any defaults (Metropolis Westchester Lanes Inc., v. Colonial Park Homes Inc., 187 AD2d 492, 589 NYS2d 570

[2d Dept., 1992]), but rather no such defaults exist. Therefore, the court will examine the default and if such are found to exist, the plaintiff will undoubtedly cure them (see, ERS Enterprises, Inc., v. Empire Holdings LLC, 286 AD2d 206, 729 NYS2d 23 [1<sup>st</sup> Dept., 2001]).

Concerning the default regarding excessive noise, paragraph 45(c)(x) of the rider to lease states the tenant will insure the tenant will not "create excess noise (provided that noise normally associated with a martial arts studio shall not be deemed excess noise" (see, Paragraph 45 of the Rider [NYSCEF Doc. No. 5]). There are surely questions of fact whether the noise level at the martial arts studio was of such a level to constitute a breach of the lease. The landlord has submitted an expert report, from Metrospec, concerning the level of noise at the martial arts studio. First, the expert report did not really discuss the noise level. Rather, it only discussed the vibration level and incidentally mentioned noise level merely as a consequence of the vibration level. The report concluded the vibration level was higher than normal and was "the equivalent of operating a pneumatic jack hammer or chipping gun in close proximity" (see, VIBRATION MONITORING AND ANAYSIS [sic] OF EXISITING [sic] RETAIL OPERATION, ¶5 [NYSCEF Doc. No. 6]). Second, the expert report did not offer any guidance whether the vibration level exceeded the expected heightened noise and

vibrations levels of a martial arts studio which the lease expressly accepted. Moreover, the tenant submitted an expert report, from Brighton, which challenged the conclusions reached by the landlord's expert. That report concluded that "the martial art studio's operations do not contribute to an undue increase in average noise levels beyond Cohen's baseline noise" (see, Brighton Report, conclusion [NYSCEF Doc. No. 26]). Further, the report concluded that "both the martial art studio and Cohen's store encounter minimal and typically imperceptible levels of vibration" (*id.*). The landlord submitted a supplemental report from Metrospec challenging the report of tenant's expert Brighton. That report concedes that landlord's expert did not conduct record noise levels and raised questions regarding Brighton's methodology of its testing. The supplemental report concluded that "the comparison of the data presented by both Brighton and Metrospec contain many variables that make it difficult to compare results. Metrospec suggests that the Vibration Monitoring be performed on a normal and ordinary business week that does not fall on holidays or special events. Both consultants should install equipment on the same day, in the same location for the same period of time. It is also recommended that additional information be provided by the 2nd floor retail tenant that describes the type of class being held on specific days as well as the age range, weight and number of participants

in order to evaluate the impacts of such participants to the Retail 1 complaints and to ultimately determine a solution where both retail operations can exist without disruption to their respective business activities" (Metrospec's 151 MONTAGUE ST - BRIGHTCON REPORT 9/18/23 COMMENTS, ¶4 [NYSCEF Doc. No. 27]). Thus, Metrospec did not undermine the conclusions of Brightcon at all and suggested the two companies should conduct simultaneous tests to reach results that are "apples-to-apples" that could be easily compared (see, Memorandum in Opposition, page 7 [NYSCEF Doc, No. 20]).


The landlord argues a Yellowstone should not be granted because the plaintiff has demonstrated an unwillingness to cure the default. However, as explained, there is no conclusion a default even exists. There are factual issues that must be explored before determining a default actually exists. Upon such a determination the plaintiff must cure or face termination of the lease. That question is premature at this juncture. Therefore, the parties must engage in discovery to determine whether the noise and vibration levels exceed those of a martial arts studio. The court recommends the advice of Metrospec and encourages the parties to conduct tests on the same day so that the experts can reach a consensus about the noise and vibration levels. In the interim the motion seeking a Yellowstone is granted.

Concerning the imposition of an undertaking, it is well settled that upon granting a Yellowstone injunction the court may impose reasonable conditions including the posting of an undertaking (Sportsplex of Middletown, Inc., v. Catskill Regional Off-Track Betting Corp., 221 AD2d 428, 633 NYS2d 588 [2d Dept., 1995]). Thus, the imposition of an undertaking is discretionary (see, Mayfair Super Markets Inc., v. Serota, 262 AD2d 461, 692 NYS2d 415 [2d Dept., 1999]). An undertaking would be appropriate for an amount rationally related to the damages that can be suffered if the relief should not have been granted (Bennigen's of New York Inc., v. Great Neck Plaza L.P., 223 AD2d 615, 636 NYS2d 835 [2d Dept., 1996]). As noted, there has been no determination that a violation of the lease even exists. Therefore, the request for an undertaking at this time is denied. Of course, the tenant must continue to pay rent and satisfy all other terms of the lease.

So ordered.

ENTER:

DATED: November 30, 2023  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC