

Dali NYC LLC v Shay

2024 NY Slip Op 30685(U)

March 5, 2024

Supreme Court, New York County

Docket Number: Index No. 159605/2023

Judge: Louis L. Nock

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

DALI NYC LLC,

Plaintiff,

- v -

ELAINE SHAY, as COURT-APPOINTED RECEIVER FOR
THE BENEFIT OF CREIF LENDER LLC,

Defendant.

-----X

INDEX NO. 159605/2023

MOTION DATE 09/28/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 3, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, and 52

were read on this motion by plaintiff for A YELLOWSTONE INJUNCTION, AND CROSS-MOTION TO DISMISS.

LOUIS L. NOCK, J.

Plaintiff’s motion for relief pursuant to *First Natl. Stores, Inc. v Yellowstone Shopping Ctr., Inc.* (21 NY2d 630, *rearg denied* 22 NY2d 827 [1968]) (a “Yellowstone” Injunction), and defendant’s motion to dismiss the complaint, are determined as follows.

Background

Plaintiff, which operates a restaurant concern, is the commercial tenant of defendant pursuant to a commercial lease dated July 1, 2021 (NYSCEF Doc. No. 13). Defendant served a Notice to Cure on plaintiff, dated September 1, 2023, noticing, as is relevant to this motion practice, the following three breaches:

You have failed to obtain and/or maintain as well as provide proof of personal and property liability insurance coverage as required by paragraph 43 of your Lease.

You have failed to obtain final DoB sign-offs for renovations you had made to the Premises pursuant to expired NYC DoB Permit No. M00641276-I1-GC-CX (General

Construction/Structural) and expired NYC DoB Permit No. M00641276-S1-PL (plumbing), in violation of Paragraph 3 of your Lease.

You have been and continue to use and occupy the Mezzanine level of the interior of the Premises for customer seating and other uses in violation of relevant law despite the fact that you have not authorized to do so before having obtained DOB sign-off for the work related thereto.

(NYSCEF Doc. No. 7.)¹ The expiration date of the Notice to Cure is September 27, 2023. The following day, plaintiff filed this action and the instant motion seeking a Yellowstone Injunction staying the expiration of the cure period and enjoining defendant from taking action to terminate the lease. This court (per Hon. Mary V. Rosado) issued an order to show cause in respect of plaintiff's motion (NYSCEF Doc. No. 14) containing a temporary restraining order reflective of the Yellowstone relief sought on the motion and the injunctive relief prayed for in the complaint.

Defendant opposes the motion and cross-moves to dismiss the action on the ground that plaintiff is not entitled to the injunctive relief prayed for in the complaint. Further grounds for dismissal are premised upon the fact that plaintiff was one day late in serving the summons, complaint, and order to show cause, as measured by the service date prescribed in the order to show cause, and on the ground that the motion was made one day after the expiration of the cure date.² The court excuses such *de minimis* lateness pursuant to its equitable authority to correct parties' mistakes, omissions, defects, or irregularities (CPLR 2001) and, therefore, denies the cross-motion to dismiss insofar as premised upon lateness grounds.

In order to succeed on its motion, plaintiff must be able to demonstrate its desire and ability to cure defaults noticed in the Notice to Cure by any means short of vacating the premises (*Graubard Mollen Horowitz & Shapiro v 600 Third Ave. Assocs.*, 93 NY2d 508 [1999]).

¹ Defendant has withdrawn two remaining cure items noticed in her Notice to Cure (*see*, NYSCEF Doc. No. 18 ¶ 5) which, therefore, do not require discussion.

² As a general rule, a motion for a Yellowstone Injunction must be made prior to the expiration of the cure date (*see*, *Three Amigos SJL Rest., Inc. v 250 W. 43 Owner LLC*, 144 AD3d 490 [1st Dept 2016]).

The Failure to Obtain Insurance

The lease rider requires plaintiff to procure \$2,000,000 in insurance coverage in connection with the premises (NYSCEF Doc. No. 21 ¶ 43). Plaintiff submits a certificate of insurance evidencing coverage for only half the required amount -- \$1,000,000 (NYSCEF Doc. No. 10). Neither that certificate, or plaintiff's affiant (NYSCEF Doc. No. 6), indicates any ability (or, in case of the affiant, any *desire* or ability) to retroactively upgrade that coverage to the required \$2,000,000 level. Accordingly, plaintiff cannot sustain its burden on this motion to demonstrate the required desire or ability to cure this aspect of the Notice to Cure (*see, Bliss World LLC v 10 W. 57th St. Realty LLC*, 170 AD3d 401, 401 [1st Dept 2019] [even where the tenant undertook to procure the required coverage, its failure to demonstrate retroactive application of same rendered its coverage-related default "not susceptible to cure"]).

The Failure to Obtain DoB Sign-Offs for Renovations

Paragraph 3 of the lease (NYSCEF Doc. No. 13) provides:

Tenant shall, before making any alterations, additions, installations or improvements, at its expense, obtain all permits, approvals and certificates required by any governmental or quasi-governmental bodies and (upon completion) certificates of final approval thereof, and shall deliver promptly duplicates of all such permits, approvals and certificates to Owner

Plaintiff concedes that it has not yet satisfied that requirement; but avers that it "is in the process of being cured" (NYSCEF Doc. No. 6 ¶ 9). No details of that process are provided. Rather, defendant lists a litany of difficulties it has encountered in the course of that process, such as its need to retain a structural engineer, its incurring of "extensive additional expenses," and plumbing issues (*id.*). This, too, fails to sustain plaintiff's burden on this motion, which requires the movant to specifically explain its plan for curing the default (*see, Bliss World LLC, supra*, at 402 ["although the tenant has generally stated that it is willing to cure . . . it does not explain how

it will”]; *see also*, *Jemaltown of 125th St., Inc. v Leon Betesh/Park Seen Realty Assocs.*, 115 AD2d 381, 382 [1st Dept 1987] [to obtain a Yellowstone injunction the tenant must “convince the court of his desire and ability to cure the defects”]. Plaintiff’s listing of difficulties entailed in trying to cure the default involving DoB sign-offs falls short of making this showing.

The Failure to Obtain DoB Sign-Offs for Mezzanine Use

Plaintiff’s counsel posits that no DoB sign-offs are required in this regard, referring the court to sections 505.2 and 505.2.1 of the Administrative Code of the City of New York (*see*, NYSCEF Doc. No. 4 at 4). However, no real detail is provided by said counsel, or plaintiff’s affiant (NYSCEF Doc. No. 6), explaining with any clarity, at all, the practical application of those sections to the actual dimensions of the space being used by plaintiff that is the subject of this aspect of the Notice to Cure. By contrast, defendant submits the detailed affidavit of licensed architect Derek Ziemer, which attests to his inspection of the subject space and states his conclusion that DoB sign-offs are most certainly required because “[t]he existing mezzanine . . . was found to be insufficient and would require repairs/reinforcement/partial rebuild to meet code requirements for public occupancy” and “[t]herefore, the use of the mezzanine is technically not permitted pursuant to the Building Code” (NYSCEF Doc. 20 ¶ 10; *see also*, NYSCEF Doc. 19 [Affidavit of Jack Press, submitted by defendant] [subject area seen as being occupied by customers of plaintiff]). Nothing of consequence is submitted by plaintiff to show either non-application of DoB approval requirements or the desire or ability to meet such requirements relating to its use of the subject space.³

³ Defendant throws into the mix allegations of non-payment of rent (*see*, NYSCEF Doc. No. 18 ¶¶ 18-20). That alleged default is not noticed in the Notice to Cure and, therefore, will not be discussed herein.

Conclusion

For all the foregoing reasons, it is

ORDERED that plaintiff’s motion for a Yellowstone Injunction is denied; and it is further

ORDERED that the temporary restraining order issued in the order to show cause (NYSCEF Doc. No. 14) is vacated; and it is further

ORDERED that defendant’s cross-motion to dismiss the complaint on substantive grounds is granted and, accordingly, the complaint is dismissed.

This will constitute the decision and order of the court.

ENTER:



<u>3/5/2024</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>
		<input type="checkbox"/> DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>
			<input type="checkbox"/>
			NON-FINAL DISPOSITION
			GRANTED IN PART
			<input checked="" type="checkbox"/> OTHER
			SUBMIT ORDER
			FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE