

**NG Crown 20 E. 46th St. LLC v
18-20/22 E. 46th St. L.L.C.**

2024 NY Slip Op 31616(U)

May 7, 2024

Supreme Court, New York County

Docket Number: Index No. 656817/2022

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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NG CROWN 20 E. 46TH STREET LLC,
Plaintiff,

- v -

18-20/22 EAST 46TH STREET L.L.C.,
Defendant.

INDEX NO. 656817/2022

MOTION DATE 01/29/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 57, 58, 59, 60, 61, 62, 63, 64, 66, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88 were read on this motion to/for LEAVE TO FILE.

Upon the foregoing documents, 20 E 45 Lender LLC (the **Lender**)’s motion to intervene is GRANTED.

NG Crown 20 E. 46th Street LLC (**Tenant**) commenced this action and obtained a *Yellowstone* injunction (NYSCEF Doc. No. 78) after 18-20/22 East 46th Street L.L.C. (**Owner**) sent notices to cure to the Tenant (NYSCEF Doc. No. 3) and threatened to terminate the Tenant’s lease (the **Lease**) because of the Tenant’s alleged default in failing to install a sprinkler system. Subsequently, the Owner filed an answer indicating, among other things, that the Tenant is in default of the Lease and requesting a declaration that the Tenant has no additional time to cure the breaches of the Lease:

42. Plaintiff breached the subject lease.

...

WHEREFORE, Defendant respectfully requests that the Court enter judgment as follows:

(a) Dismissing the Complaint in its entirety and declaring that Plaintiff has breached the Lease and *has no additional time to cure the breach(es) of the Lease*;

(NYSCEF Doc. Nos. 39, ¶ 42, at 7 [emphasis added]).

As relevant, and significantly, the Lease provides that in the event of a default by the Tenant, the Lender (as leasehold mortgagee) has **certain current rights, including the right to cure any Tenant default**, and, following a termination of the lease, the Lender has the to enter into a lease with the Landlord on the same terms and conditions of the Lease by providing notice and paying any and all amounts due:

TWENTY-SIXTH: Any notice or demand which, under the terms of this **lease** or under any statute, must or may **be** given or made by the parties hereto, must be in writing, and must be given or made by mailing the same by registered mail addressed to the respective addresses of the parties hereinbefore given. Either party may designate by notice in writing a new or other address to which such notice or demand shall thereafter be so given, made, or mailed. Any notice given hereunder by mail shall be deemed delivered when deposited in a United States general or branch post office, enclosed in a registered, prepaid wrapper, addressed as hereinbefore provided, except that if so requested by the holder of any first mortgage on the leasehold interest herein demised who or which shall have duly registered with the Landlord his or its name and address any such notice shall also be delivered in the manner herein specified and contemporaneously, to such leasehold-mortgagee at his or its registered address, and in the event of any such registration no default predicated on the giving of any notice shall be complete unless like notice shall have been given to such first leasehold-mortgagee and any time specified in such notice for the bringing of such default into existence shall have expired. ***Any leasehold-mortgagee shall have the rights to cure any default hereunder by the Tenant. Without impairing the generality of the foregoing,*** it is particularly agreed that any first leasehold-mortgagee shall have the following rights: (a) to exercise any renewal option within thirty (30) days after the Tenant's time to do so has expired, of which fact the Landlord shall give such first leasehold-mortgagee prompt written notice and (b) to appoint an arbiter, in case the Tenant shall fail to make such appointment after written notice from the Landlord as provided in Paragraph "NINETEENTH" hereof, and, for this purpose, shall have an additional period of fifteen (15) days to make such appointment, and the arbiter so appointed shall thereupon be recognized in all respects as if he had been appointed by the Tenant.

The Landlord will not accept any surrender, or enter into any modification, of this lease without the prior written consent thereof of the holder of any first mortgage on this

lease who shall become entitled to notice, as provided in the preceding paragraph of this Paragraph “TWENTY-SIXTH”.

If, by reason of any default by the Tenant, either this lease or any renewal thereof shall be terminated at the election of Landlord prior to the stated expiration therefore, the Landlord will enter into a new lease of the demised premises with such mortgagee (i.e., the holder of a first mortgage on this lease who shall become entitled to notice as provided in the first paragraph of this Paragraph “Twenty-sixth” hereof) for the remainder of the term, effective as of the date of such termination, at the rent and additional rent and upon all the terms, provisions, covenants and agreements contained in this lease subject however, to the rights, if any, of sub-tenants and lawful occupants then in possession of any part of the demised premises, provided (a) said mortgagee shall make written request upon the Landlord for such new lease within forty (40) days after the date of such termination and such written request is accompanied by payment to the Landlord of all sums then due to the Landlord under this lease; (b) said mortgagee shall pay to Landlord, at the time of the execution and delivery of said new lease, any and all sums, in addition to those which would at the time of the execution and delivery thereof be due under the lease but for such termination, and in addition thereto, any expenses, including legal and attorneys’ fees, to which the Landlord shall have been subjected by reason of such default; and (c) said mortgagee shall, on or before execution and delivery of said new lease, perform and observe all the other covenants and conditions herein contained on the Tenant’s part to be performed and observed to the extent that the Tenant shall have failed to perform and observe same (in the event that there shall be work to be performed on the part of the Tenant, the deposit with Landlord of a sum in cash equivalent to the cost of such work shall be deemed to be compliance with the foregoing requirement. If the parties cannot agree as to the cost of doing any such work, such dispute shall be resolved by arbitration in the manner provided in Paragraph “NINETEENTH” hereof.) Upon execution and delivery of such new lease any subleases which may have theretofore been assigned and transferred to the Landlord shall thereupon be assigned and transferred without recourse by the Landlord, to the new tenant.

(NYSCEF Doc. No. 2, ¶ 26 [emphasis added]).

In opposition to the motion, the Owner argues that the Court should deny the motion because it is **both** premature and untimely. To wit, the Owner argues it is premature because the lease is not yet terminated, thus the Lender does not yet have the right to a new lease and the *Yellowstone* prevents termination. The Owner argues that the motion is untimely because months have elapsed in this litigation since they have filed their answer. Neither argument is availing.

CPLR 1012 provides:

(a) Intervention as of right. Upon timely motion, any person shall be permitted to intervene in any action:

...

2. when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment; or
3. when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment.

CPLR 1013 provides:

Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

The Owner is simply not correct that the Lender does not have current rights under the Lease.

As discussed above, the Lender has a current right to cure any default by Tenant.

Inasmuch as the Owner seeks a declaration that the Tenant is in default and the time to cure any such default has elapsed, this action necessarily involves a claim for damages for injury to property and the Lender may be adversely affected by the judgment such that intervention as of right is proper (CPLR 1012[a][3]). Indeed, if there is in fact a default, the Lender has the right to cure. If, on the other hand, the Owner receives the relief it seeks, the Lender would have the immediate right to enter into a lease with the Owner on the terms and conditions of the Lease. Either way, intervention is proper at this time. Any judgment as to the status of the alleged

Tenant default would materially impact and bind the Lender. This is not purely hypothetical or speculation. In fact, the Receiver in the Foreclosure Action (hereinafter defined) appeared and indicated (*tr.* 5.7.24) that the Lender has been in contact with the Receiver and is beginning to commence a cure pursuant to its rights under Paragraph 26 of the Lease.

Reference is made to a related case (the **Foreclosure Action**) captioned *20 E 46 E Lender LLC v. NG Crown 20 E 46th St. LLC, et al.*, Index No. 850631/2023 in which the Lender has sought to foreclose on the leasehold mortgage.¹ Given the pending foreclosure action, the Lender is also correct that intervention is proper because the Tenant may not adequately represent their interest and they would be affected by the judgment (CPLR 1012[a][2]).

In addition, the Court notes that the claims set forth in the Intervention Complaint (NYSCEF Doc. No. 61) involve common questions of law or fact including whether Tenant is in default (and, as such, whether the Lender has the right to cure). To the extent that the Owner intends to move to dismiss any cause of action asserted in the Intervention Complaint, they may do so. At this stage, however, it is entirely proper to seek a judicial declaration as to its right to cure the Sprinkler Project default (particularly given the Owner's opposition to the motion and their position that motion is premature because Lender does not have the current right to cure under the Lease) in the Court and in the action which is deciding whether such default has occurred and whether and when such cure has been realized.

¹ In that case, in April, 2024, the Court (Schechter, J.) denied the Owner's motion (Index 850631/2023, NYSCEF Doc. No. 110) holding that because the Owner's rights would be not be affected by a foreclosure of the leasehold mortgage, intervention was not proper.

Finally, the Court notes that the motion is not untimely. Simply put, there has not been a substantial delay in bringing this motion and fact discovery is not complete. The Court gave leave to bring this motion and indicated that the discovery schedule would be adjusted if in fact the motion was granted. Lastly, the fact that the Owner recently sought to intervene in the related foreclosure action also highlights the timeliness of the dispute between the parties. Inasmuch as the Owner indicates a desire to have the Sprinkler Project completed, it is quite frankly puzzling why the Owner opposes the Lender seeking to effectuate such cure and ultimately a declaration that in fact the cure has been realized.

As discussed on the record (*tr.* 5.7.24), counsel for Owner indicated that he would like 45 days to file responsive papers to Lender's Intervenor Complaint. The parties confirmed no additional document discovery is necessary, and during such 45-day period all existing discovery will be produced to the Lender. Depositions shall be scheduled to occur following the Owner's motion against the Intervenor Complaint, to occur in the fall of this year as set forth below.

The Court has considered the parties remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that the Lender's motion to intervene is granted; and it is further

ORDERED that the Owner shall file responsive papers to the Lender's Intervenor Complaint within 45 days of this Decision and Order, *i.e.*, on or before June 21, 2024; and it is further

