SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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19-21-23 WEST 9TH STREET LLC

Plaintiff,

- v -

PENQUIN TENANTS CORPORATION,

Defendant.

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INDEX NO. 153211/2024

MOTION DATE 04/09/2024

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, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Plaintiff commenced this action for, among other things, a preliminary and permanent injunction enjoining defendant from taking any steps to terminate plaintiff's lease, against defendant, concerning the property located at 19-21-23 West 9th Street, New York, New York (premises). Plaintiff now moves for a *Yellowstone* injunction and, pursuant to CPLR 7503 to compel arbitration. The motion is opposed. For the following reasons, the motion is granted.

Plaintiff is a commercial tenant at the premises, and the defendant is the landlord. On May 18, 2023, defendant served the notice to cure upon plaintiff, stating that plaintiff breached the terms of the lease requiring plaintiff to "comply with all present and future laws, orders and regulations of all state, federal, municipal and local governments and departments." Specifically, defendant contends that plaintiff violated the ease with the construction of the illegal extensions, which also led to the issuance of a Department of Buildings (DOB) violation. The March 29, 2000 DOB violation provides that: "WORK W/O PERMIT NOTED: AT BASEMENT LEVEL REAR EXTENDED CREATING ADDITIONAL EATING COOLING & ACCESORY[sic] USES SPCES YARD AREA REDUCED AT WEST SIDE AND COMPLETELY USED AT EAST LOCATION BLDG DEPT WOOD PA 64/53 PLAN."

According to plaintiff, the rear extension referenced in the DOB violation was constructed in approximately 1979. Plaintiff states that in 2005, it prepared plans to "legalize" the rear extension, but the Coop. refused to sign off on the plans, which would have required the removal of two decks erected by shareholders over the rear extension. In 2005, plaintiff commenced an action to compel the Coop. to sign off on the plan to legalize the rear extension, filed in Supreme Court, New York County, entitled *Ellenberg v Penquin Tenants Corporation*, index no. 110490/2005. The matter was referred to arbitration, and the parties settled the rear extension dispute pursuant to the March 28, 2007 stipulation, which laid out the terms for resolving the legalization of the rear extensions. Pursuant to paragraph 4 of the settlement

stipulation, the parties agreed to "[t]he Arbitrator retaining jurisdiction in this proceeding: (i) to supervise the enforcement of this Stipulation and any and all disputes arising hereunder, and (ii) to enforce, by injunctive relief, the Arbitrator's 'revised' lease rules" (Index no. 110490/2005, NYSCEF doc. no. 82, stipulation, ¶ 4).

On May 18, 2023, the plaintiff engaged an architect, Arthur Sikula[1], to survey the condition. Mr. Sikula informed plaintiff that the rear extension could be legalized, but the shareholders' decks could not be legalized as of right. Plaintiff states that defendant agreed to remove the rear extension and decks instead of plaintiff. Plaintiff would then rebuild the rear extension in accordance with DOB regulations. According to plaitniff, defendant engaged an architect who prepared architectural plans, and sought construction bids to remove the rear extension and decks. Defendant received bids to perform the work in December 2023. Plaitniff states that the parties were negotiating a settlement from the issuance of the notice to cure through March 29, 2024, but that defendant, without warning, terminated the settlement discussions on March 29, 2024. Plaitniff further states that on April 1, 2024, defendant signed the notice of termination without any advanced warning to plaintiff of its intention to terminate the lease. The termination notice provides that plaintiff's lease will be terminated as of April 10, 2024.

Plaintiff commenced another action in Supreme Court, New York County, entitled *19-21-23 West 9th Street LLC v Penquin Tenants Corporation*, index no. 154122/2021, wherein plaintiff seeks a *Yellowstone* injunction stemming from an April 13, 2021 notice to cure, claiming that plaintiff failed to procure liability insurance on behalf of defendant. Pursuant to the August 26, 2021 decision and order, plaintiff's application for a *Yellowstone* injunction was granted, pending a hearing, and further directed plaintiff to post a bond in the amount of $259,687.59 and for use and occupancy, *pendente lite*, in the amount of $3,489.18, per month. That matter is still ongoing.

"The purpose of a Yellowstone injunction is to allow a tenant confronted by a threat of termination of the lease to obtain a stay tolling the running of the cure period so that after a determination on the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold" (*Hopp v. Raimondi*, 51 AD3d 726, 727 [2d Dept 2008]). 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 508, 514 [1999]).

Here, plaintiff demonstrates its entitlement to a Yellowstone injunction. There is a commercial lease between the parties, a notice of default and opportunity to cure was issued by defendant as against plaintiff for the alleged failure correct a DOB violation, plaitniff demonstrated its intention and ability to cure, and plaintiff timely sought a temporary restraint before the expiration of the cure period. As for the final prong, defendant contends that plaintiff commenced this action after the time expiration of the notice to cure. However, plaintiff argues, and defendant does not deny, that the parties were engaged in good-faith negotiations to settle

the action until defendant abruptly served the notice of termination. In any event, this action is timely as the lease has not been terminated, and the plaintiff hired an architect to cure the DOB violations.

The Court further holds that plaintiff shall pay the ongoing use and occupancy in the amount of $4,905.80, per month, no later than the 1st day of each month, commencing June 1, 2024, without prejudice. This decision and order is not meant to be read as overriding the August 27, 2021 decision and order, but instead directing plaintiff to pay rent commensurate with the amount the parties agreed upon as the monthly rent due. Further, while plaintiff posted a bond in the 2021 action, plaitniff is also required to post a bond in the agreed upon amount of $24,544, encompassing rental arrears and other charges due under the lease commencing from January 2024 through May 2024.

CPLR 7503(a) states that parties have a right to compel arbitration "where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation." "[A] party will not be compelled to arbitrate ... absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes. The agreement must be clear, explicit, and unequivocal" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 132-133 [1st Dept 2014] [internal citations omitted]). Here, the parties explicitly agreed to arbitrate the issues concerning the "legalization of the rear extensions," and to permit the arbitrator to "retain jurisdiction in this proceeding" and supervise the enforcement of the "[s]tipulation and any and all disputes arising hereunder." As the issues concerning the legalization of the rear extension in this action are identical to the issue in the 2005 action, the issue of legalizing the rear extension is referred to an arbitrator to determine the parties' compliance with the March 28, 2007 stipulation.

Accordingly, it is hereby,

ORDERED that the Court grants plaintiff'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 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 commencing June 1, 2024, plaintiff shall pay defendant use and occupancy each month in the amount of $4,905.80, on every first of the month until further order of the Court; and it is further

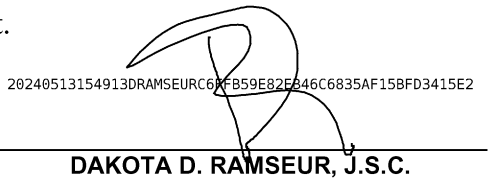
ORDERED that the Court fixes an undertaking in the sum of $24,544 conditioned that plaintiff, if it is finally determined that it was not entitled to an injunction, will pay to defendant all damages and costs which may be sustained by reason of this injunction, within thirty (30) days; and it is further

ORDERED that the branch of plaintiff's motion pursuant to CPLR 7503 to arbitrate this matter pursuant to the March 28, 2007 is granted to the extent that the parties shall engage the arbitrator to address the issues, including the issue of legalizing the rear extension, within ten (10) days of entry; and it is further

ORDERED that the parties shall appear for a status conference in Part 34 on July 30, 2024 at 9:30 a.m.; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant, within ten (10) days of entry.

This constitutes the decision and order of the Court.



5/7/2024
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE