Hajjadi v Tomba Realty LLC
2024 NY Slip Op 35485(U)
April 12, 2024
Supreme Court, Bronx County
Docket Number: Index No. 800602/2024E
Judge: Fidel E. Gomez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
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MARYA ABDUL SALAM AL HAJJADI,
DBA 3029 CANDY AND ELECTRONICS CORP.

Plaintiff,

-against-

DECISION AND ORDER

Index No. 800602/2024E

TOMBA REALTY LLC,

Defendant.
---X

Plaintiff's Order to Show Cause (OSC) seeking a *Yellowstone* injunction and/or preliminary injunction is granted in part. Defendant's cross-motion for an Order dismissing the action for failure to state a cause of action pursuant to CPLR § 3211(a)(7) or, alternatively, pursuant to CPLR § 3211(f), granting defendant an extension of time to file an answer, is granted in part.

BACKGROUND

The amended complaint in this action alleges causes of action for declaratory judgment,[1] anticipatory breach of contract, and permanent injunction in connection with the termination of a commercial lease. Specifically, plaintiff alleges as follows: On or about August 14, 2023, plaintiff entered into a written lease with defendant (the Lease). The Lease is for a term of one year, with an option to renew for an additional three years. Defendant has accepted all rental payments from the inception of the Lease through the present without any objection as to how the premises was being used. By a Fifteen (15) Day Notice to Cure (the Notice), dated

[1]Other than in the "wherefore" clause, a first cause of action for declaratory judgment is not denominated. Indeed, the body of the complaint does not indicate a first cause of action. However, in the paragraphs preceding the second cause of action, plaintiff clearly seeks declaratory relief.

November 28, 2023, defendant demanded that plaintiff cure various alleged defaults by no later than January 12, 2024, otherwise the lease would be terminated and summary proceedings would be instituted to evict plaintiff from the premises. Defendant alleges that plaintiff is using the subject premises as a convenience store without providing any details, including what plaintiff is purportedly selling. Defendant also alleged that plaintiff sublet the premises. Plaintiff has not violated the Lease. Defendant had actual knowledge of the use of the premises, which is open and obvious. Plaintiff has diligently commenced to cure all alleged defaults by ascertaining what lease violations are alleged by defendant. On or about December 28, 2023, plaintiff's attorney mailed a letter to defendant's attorney requesting more information about the alleged breach so that plaintiff could seek to cure the alleged defaults. Defendant's attorney did not respond to that letter. Plaintiff has the desire and ability to cure any alleged defaults. Plaintiff will cease to engage in actions which the Court finds to have violated the lease. Plaintiff cannot fully cure the alleged violations of the Lease, prior to January 12, 2024, especially where defendant failed to respond to plaintiff's December 28, 2023 letter. Plaintiff will suffer irreparable harm if defendant is permitted to exclude it from the premises, remove its property from the premises and/or violate the unique rights provided to plaintiff under the Lease. Plaintiff does not have an adequate remedy at law and is entitled to a declaration of rights. Plaintiff seeks a declaration that the Lease is in full force and effect and that plaintiff has the right to occupy the premises. Plaintiff also seeks an extension of all cure periods. Plaintiff's anticipatory breach cause of action alleges that plaintiff has fully complied with its obligations under the Lease, defendant has unfairly and unjustifiably threatened to remove plaintiff from use and possession of the premises, and plaintiff is entitled to money damages, including treble damages. Plaintiff's permanent injunction cause of action alleges that, by virtue of the previous allegations in the complaint, plaintiff is entitled to an injunction enjoining and restraining defendant from interfering with plaintiff's use and occupancy of the premises, staying the commencement of any eviction proceedings, and staying any cure period, and/or termination of the Lease.

* * * * * * * *

In support of the OSC, Plaintiff submitted the affidavit of Marya Abdul Salam Al Hajjadi (plaintiff) wherein she reiterates the allegations in the complaint and, in addition, states as follows: Plaintiff is the commercial tenant of the premises and has expended a significant sum of money in the premises and in operating its business. The Lease required a security deposit of $12,800. The yearly rent for the premises is $38,400 plus $300 for the first year; $42,000 plus $300 for years 2024-2027, and the parties are to agree on the rent for the years 2027-2029. Plaintiff did not sublet the premises. Plaintiff has the desire and ability to cure any alleged defaults, and will only sell what is legally allowed to be sold pursuant to the law and/or the Lease. Assuming, *arguendo,* the truth of defendant's allegations, said defaults are of a nature that same cannot be completely cured or remedied within the cure period, especially with defendant ignoring the December 28, 2023 letter sent by plaintiff's attorney to defendant. Defendant had actual knowledge of what plaintiff was selling, and waived any alleged default by accepting rent. Unless the preliminary injunction is granted, plaintiff faces eviction from the premises.

Plaintiff attached copies of the Lease, Notice, and various communications between the attorneys representing plaintiff and defendant. The "Standard Form of Store Lease," dated August 14, 2013, is between defendant, as owner, and plaintiff, as tenant, and states that the demised premises is to be used for an "Exotic Candy and Electronics shop." Section (1) of paragraph 17 of the Lease provides that, if a default occurs, upon owner serving a written (15) day notice upon tenant specifying the nature of the default, and upon the expiration of the 15-day period, "if Tenant shall have failed to comply with or remedy such default, or if the default . . . shall be of a nature that the same cannot be completely cured or remedied within said fifteen (15) day period, and if Tenant shall not have diligently commenced curing the default within such fifteen (15) day period, and shall not thereafter with reasonable diligence and in good faith proceed to remedy or cure such default, then Owner may serve a written five (5) days' notice of cancellation of this lease upon Tenant."

A letter, dated October 15, 2023, from defendant's attorney to plaintiff's attorney states, in part: "W e have received a couple of phone calls from a person by the name of Isa. He claims to have purchased the store at the above location from you. You should know that any transfer or sale of lease has to be approved by landlord." The letter also states that "[w]hen we executed a new lease in August in your name and according [sic] Sam Alkahiss' instructions, and before the court stipulation, he mentioned that you are a member of his family. Your lease is no longer in effect. According to the court stipulation, neither you nor any member of your family or friends can do business at this location for a minimum of three years. We urge you to vacate the store and to return the keys within the next ten days to our superintendent, Mario Hernandez."

The Notice is dated November 28, 2023 and states, *inter alia,* that plaintiff is in violation of the Lease "in that contrary to paragraph 2 and 11 . . . and Paragraph 45 of the Lease Rider, you have sublet and/or assigned the subject premises without the written permission of the landlord and are also violating the use clause of your lease." The bases for the landlord's conclusions are listed as "1. You are illegally subletting to a male individual named 'ISA DOE' who called the landlord and represented himself as the 'new owner of the store,'" and "2. You are in violation of the General use clause, premises is to be used as an Exotic candy and Electronic shop and is being used as a 'convenience store.'" The Notice states that plaintiff must cure the violations either by "curing the illegal sublet(s) and/or assignment(s), permanently removing the current occupant(s) who are not permitted to occupy the commercial space pursuant to your lease and the law, moving back into the premises and using the premises for the purpose permitted pursuant to the lease," and by "[c]oordinating with the landlord to confirm same by contacting the landlord . . . for the landlord to verify the above cure has been effectuated." The Notice further states that "[s]uch cure must occur no later than" January 12, 2024, and that the failure to cure will result in another notice to plaintiff which will terminate plaintiff's tenancy and the Lease.

A letter dated December 28, 2023, from plaintiff's attorney to defendant's attorney, consists of the following two sentences: "As the attorney for the tenant, please be advised that any claim of a breach of lease is in error. If you have proof to the contrary, kindly provide me with said proof."

* * * * * * * * *

In opposition to the OSC, defendant contends that: (1) plaintiff failed to sufficiently demonstrate its ability and willingness to cure the default alleged in the Notice; (2) a *Yellowstone* injunction may not be issued in favor of a tenant to prevent the commencement and prosecution of a nonpayment summary proceeding; (3) the Court may not enjoin defendant's ability to threaten to or actually terminate the tenancy based upon grounds not alleged in the Notice; (4) plaintiff has not demonstrated a right to a preliminary injunction; and (5) if the Court grants an injunction, then rent and additional rent in accordance with the Lease should be directed to be paid to defendant.

In support of its cross-motion to dismiss the complaint pursuant to CPLR § 3211(a)(7), defendant contends that: (1) where a commercial tenant lacks the ability to obtain a *Yellowstone* injunction, any declaratory judgment relief interposed in the case may not proceed: (2) if a tenant can receive full relief from an eviction case, whether commenced by a summary proceeding or ejectment action, then a tenant is not legally entitled to proceed on its injunction claim in Supreme Court; (3) plaintiff can interpose appropriate defenses and counterclaims if and when defendant files a summary proceeding or ejectment action based on the Notice and future termination notice predicate thereon; and (4) an anticipatory breach claim requires allegations and proof that defendant sought to completely repudiate the lease and that defendant served a "definite and final communication," which has not occurred because defendant merely served a notice to cure, providing plaintiff an opportunity to cure; thus, such a claim is not ripe.

In support of the foregoing arguments, defendant submitted the affirmation and attached exhibits of counsel. Counsel submitted a so-ordered Stipulation of Settlement, dated November 6, 2023, between defendant and nonparty City of New York, in an action titled The City of New York v The Land and Building Known as 3029 Middletown Road et al., under Index No. 811757/2023E in Supreme Court, Bronx County. Counsel points to paragraph 4 of the

Stipulation, which states, *inter alia,* that "TOMBA REALTY, LLC . . . shall be enjoined from . . . permitting the subject premises to be used, occupied or operated for the sale of cannabis . . . without the requisite license." Paragraph 10 states that the "stipulation shall remain in effect for as long as defendant TOMBA REALTY, LLC owns or otherwise maintains a legal interest in the subject premises or for a period of three (3) years, whichever is shorter." Counsel states that he received an email from the attorney representing the City of New York (the City) which stated that tenants in the premises were selling cannabis without a license, and that a photo of the cannabis was included in that email. Counsel states that the City's attorney later provided him with a copy of a Property Clerk Invoice showing the quantity of cannabis seized. Counsel attached copies of the email and invoice to his affirmation, which support his statements therein. Counsel also submitted a copy of a "Summons and Commissioner's Order to Correct Violations and Certify Correction" indicating a violation against the premises, issued on December 7, 2023, for work performed without a permit, to wit, a "black wrapped around illuminated business accessory sign with white wording for HOBERT LOTTO AND CONVENIENCE" installed onto the building. Counsel states that the foregoing incidents and violations occurred after service of the Notice and, thus, could not have been mentioned as a breach of the parties' lease. Counsel further states that, if the case is not dismissed and trial is needed, approximately $15,000 in attorneys' fees will be incurred by defendant.

* * * * * * * *

In reply and in opposition to defendant's cross-motion, plaintiff contends that: (1) defendant failed to show that the pleadings do not state a cause of action since defendant did not cite to any portion of the pleadings; (2) regarding the allegation that marijuana is sold, the Property Clerk Invoice submitted by defendant indicates that the marijuana was seized from Middletown Exotic Smoke Zone, which is not a named party herein; (3) an allegation of selling marijuana was not stated in the Notice and, thus, cannot be considered as a basis for terminating the Lease; (4) plaintiff denied subletting and is not required to admit responsibility for an alleged default to obtain *Yellowstone* relief; (5) defendant has to be successful before obtaining an award of legal fees; and (6) plaintiff is willing to pay rent and/or use and occupancy as a reasonable undertaking herein, which is sufficient to protect defendant.

Yellowstone Injunction

A *Yellowstone* injunction maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining 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, 514 [1999]). The party requesting a *Yellowstone* injunction must demonstrate 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 (*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" (*Graubard Mollen* at 514 citing *Post v 120 E. End Ave. Corp.,* 62 NY2d 19, 25 [1984]). Notably, in granting *Yellowstone* relief, the courts require far less than the showing normally required for obtaining preliminary injunctive relief (*225 E.* 36th *Street Garage Corp.* at 421). For example, to obtain *Yellowstone* relief a tenant need not show a likelihood of success on the merits; it can simply deny the alleged breach of its lease (*Artcorp Inc. v Citirich Realty Corp.,* 124 AD3d 545, 545 (1st Dept 2015); *Boi To Go, Inc. v Second 800 No. 2 LLC,* 58 AD3d 482, 482 [1st Dept 2009]["Although denying responsibility for the defaults set forth in defendant's notice, i.e., that plaintiff permitted offensive odors to emanate from its establishment to other areas of the building, plaintiff has nonetheless evinced a willingness to cure any defaults, if found by the court. Here, there has yet to be a determination that odors were indeed coming from plaintiff's establishment, or, if so, whether plaintiff was responsible for them. Accordingly, there is no basis to evaluate whether plaintiff is in violation of its lease."][internal citations omitted.). "Rather than requiring the tenant to prove, on his application, that he can cure the alleged defects, all he need do to obtain the *Yellowstone* injunction is to convince the court of his desire and ability to cure the defects by any means short of vacating the premises" (*Jemaltown of 125th Street, Inc. v Leon Betesh/Park Seen Realty Associates,* 115 AD2d 381, 381 [1st Dept 1985]["A sufficient showing has been made here. It is plaintiff's substantial property interest in this lease that warrants preservation of its right to cure, in order to ensure that should plaintiff ultimately prevail on the merits, that victory will not have been nullified by prior termination of the lease."]; *Podolsky v Hoffman,* 82 AD2d 763, 763 [1st Dept 1981][Because the plaintiffs have a substantial property interest their right to cure must be preserved to ensure that if they prevail on the merits their success will not be nullified by the lease having been terminated . . . Here, the alleged violation, a noxious odor emanating from plaintiffs' apartment, does not require termination of the lease to effect a cure."]).

Here, defendant alleges that plaintiff is in violation of the Lease because it: (1) sublet or assigned the Lease to a third party without prior written permission from defendant; (2) is selling marijuana without a license at the premises; and (3) the premises is impermissibly being used as a convenience store. Under the Lease, the permissible use for the premises is as an "Exotic Candy Store and Electronics shop." With respect to (3) above, defendant does not specify what is being sold at the "convenience store" that is impermissible under the Lease. Notably, in her affidavit, plaintiff denies subletting the premises, and states that she has the desire and ability to cure any alleged violations, and will only sell what is legally allowed to be sold, pursuant to the law and/or the Lease. Plaintiff also notes her substantial financial investment in the premises and in operating the business at the premises. Based on the foregoing authority, this is sufficient to demonstrate that plaintiff is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises for purposes of obtaining *Yellowstone* relief. Plaintiff has also demonstrated that she holds a commercial lease; she received from the landlord a notice to cure and that she requested injunctive relief prior to the termination of the lease.

Preliminary Injunction

To the extent that plaintiff seeks an injunction under traditional preliminary injunction standards, said application is denied as moot since the Court has granted plaintiff a *Yellowstone* injunction.

Dismissal Pursuant to CPLR § 3211(a)(7)

As stated previously, defendant contends that the complaint should be dismissed for failure to state a cause of action, pursuant to CPLR § 3211(a)(7), because: (1) where a commercial tenant lacks the ability to obtain a *Yellowstone* injunction, any declaratory judgment relief interposed in the case may not proceed; (2) if a tenant can receive full relief from an eviction case, whether commenced by a summary proceeding or ejectment action, then a tenant is not legally entitled to proceed on its injunction claim in Supreme Court; (3) plaintiff can interpose appropriate defenses and counterclaims if and when defendant files a summary proceeding or ejectment action based on the Notice and future termination notice predicate thereon; and (4) an anticipatory breach claim requires allegations and proof that defendant sought to completely repudiate the lease and that defendant served a "definite and final communication," which has not occurred because defendant merely served a notice to cure, providing plaintiff an opportunity to cure; thus, such a claim is not ripe.

Defendant counters that defendant failed to show that the pleadings do not state a cause of action since defendant did not cite to any portion of the pleadings.

<u>Standard of Review</u>

In deciding a motion to dismiss pursuant to CPLR § 3211, a court must "accept the facts alleged in the complaint is true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). The pleading is to be afforded a liberal construction (*id.* at 87). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC,* 23 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 152 [2002]). "Where . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullman v Norma Kamali, Inc.,* 207 AD2d 691, 692 [1st Dept 1994]).

It is well settled that a defense based on documentary evidence is not dispositive "unless the documents submitted resolve all of the factual issues as a matter of law" (*Standard Chartered Bank v D. Chabbott, Inc,* 178 AD2d 112, 112 [1st Dept 1991]). Dismissal of the complaint pursuant to CPLR § 3211(a)(1), therefore, is only warranted where "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.,* 98 NY2d 314, 326 [2002]).

When a party moves to dismiss a complaint pursuant to CPLR § 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*Guggenheimer v Ginzburg,* 43 NY2d 268 [1977]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (*EBC I, Inc. v Goldman Sachs & Co.,* 5 NY3d 11, 19 [2005]). On a motion made pursuant to CPLR § 3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party (*Sokol v Leader,* 74 AD3d 1180, 1181 [2nd Dept 2010]). While "CPLR § 3211 allows a plaintiff to submit affidavits, [] it does not oblige him to do so on penalty of dismissal" (*Rovello v Orofino Realty Co.,* 40 NY2d 633, 635 [1976]). Affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint, and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (*id.* at 636). Thus, a plaintiff "will not be penalized because he has not made an evidentiary showing in support of his complaint" (*Rovello* at 635).

However, a court may consider evidentiary material submitted by a defendant, and if it does so, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer* at 275). Affidavits submitted by a defendant "will almost never warrant dismissal under CPLR § 3211 unless they establish conclusively that [the plaintiff] has no cause of action" (*Lawrence v Graubard Miller,* 11 NY3d 588, 595 [1976] quoting *Rovello* at 636). Indeed, a motion to dismiss pursuant to CPLR § 3211(a)(7) must be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Guggenheimer* at 275).

DISCUSSION

Declaratory Judgment - 1st Cause of Action

The general purpose of a declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations (*James v Alderton Dock Yards,* 256 NY 298, 305 [1931]; *Touro College v Novus University Corp.,*146 AD3d 679, 679 [1st Dept 2017]). Pursuant to CPLR § 3001, "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." Indeed, declaratory judgments are commonly used to determine parties' rights and interests in real property.

With respect to the declaratory judgment cause of action, the complaint alleges that plaintiff has paid defendant all sums due under the Lease and satisfactorily provided the services set forth in the Lease; defendant is improperly seeking to evict plaintiff; plaintiff is not in default under the terms of the Lease, defendant's threatened eviction will violate plaintiff's exclusive rights under the Lease, including the right to use and occupancy and peaceful and quiet enjoyment of the premises; plaintiff will suffer irreparable harm if defendant is permitted to exclude it from the premises; there is an actual controversy between the parties; plaintiff does not have an adequate remedy at law; and plaintiff is entitled to a declaration of rights, i.e., that the Lease is in full force and effect and plaintiff has the right to occupy the premises. This is sufficient to state a cause of action for a declaratory judgment. Nothing submitted by defendant demonstrates otherwise.

Anticipatory Breach of Contract - 2nd Cause of Action

"The principle of anticipatory breach of contract is supported by sound policy considerations. Once a party has indicated an unequivocal intent to forego performance of his obligations under a contract, there is little to be gained by requiring a party who will be injured to await the actual breach before commencing suit, with the attendant risk of faded memories and unavailable witnesses" (*Rachmani corp v 9 East 96th Street Apartment Corp.,* 211 AD2d 262, 266-267 [1st Dept 1995]). However, it is clear that there must be a definite and final communication of the intention to forego performance before the anticipated breach may be the subject of legal action (*id.* at 267; *Ga Nun v Palmer,* 202 NY 483, 489-490 [1911]).

Here, plaintiff's anticipatory breach of contract cause of action alleges that plaintiff has fully complied with its obligations under the Lease and that defendant has unfairly and unjustifiably threatened the removal of plaintiff from use and possession of the premises, which would abrogate plaintiff's sole and exclusive right to use and occupancy at the premises and would be tantamount to a wrongful eviction. Significantly, the complaint does not allege any definite and final communication evincing defendant's intent to terminate the Lease or remove plaintiff from the premises. Here, as defendant notes, the only action taken by defendant is the service of a notice to cure, under which the Lease would only be terminated if tenant failed to cure the alleged defaults within the allotted time period. By its terms, the notice does not constitute a definite and final communication of defendant's intention to terminate the Lease. Indeed, the notice states "PLEASE BE ADVISED that upon your failure to cure this violation no later than the 12th day of January, 2024, you will be sent another notice which will terminate you tenancy and the Lease." To date, said notice has not been sent. As such, the complaint does not state, and plaintiff does not have, a cause of action for anticipatory breach of contract.

Permanent Injunction - 3rd Cause of Action

To sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that: (1) there was a violation of a right presently occurring, or threatened and imminent; (2) he or she has no adequate remedy at law; (3) serious and irreparable harm will result absent the injunction; and (4) the equities are balanced in his or her favor (*Caruso v Bumgarner,* 120 AD3d 1174, 1175 [2d Dept 2014]; *Elow v Svenningsen,* 58 AD3d 674, 675 [2d Dept 2009]).

With respect to the permanent injunction cause of action, the complaint realleges the prior allegations and, in addition, states that "[b]y virtue of the foregoing, and by the terms of the Lease, the Plaintiff is entitled to an injunction enjoining and restraining the Defendant from interfering with the Plaintiff's use and occupancy of the Subject Premises, staying the commencement of any eviction proceedings, and staying any cure period, and/or termination date, relevant herein."

Here, the complaint alleges, *inter alia,* that defendant is improperly seeking to evict plaintiff, plaintiff is not in default under the terms of the Lease, defendant's threatened eviction will violate plaintiff's exclusive rights under the Lease, including the right to use and occupancy and peaceful and quiet enjoyment of the premises, and that plaintiff will suffer irreparable harm if defendant is permitted to exclude it from the premises and remove its property from the premises. In her affidavit, plaintiff states that she has expended a significant sum of money in the premises and in operating the business at the premises. Thus, plaintiff alleges a violation of plaintiff's current rights under the Lease, and that, given plaintiff's substantial property interest in the Lease and plaintiff's investment in and operation of a unique business at the premises, there is no adequate remedy at law, plaintiff will suffer serious and irreparable harm if the Lease is terminated, and the equities favor plaintiff's continued operation of the business at the premises. As such, plaintiff sufficiently states a cause of action for a permanent injunction.

To the extent that defendant's Notice of Cross-Motion includes an application pursuant to CPLR § 3211(f) for an extension of time to serve an answer, the Court notes that section 3211(f) provides that "[s]ervice of a motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order." Thus, a court order is not required for the extension of time provided for in CPLR § 3211(f), and defendant's application for same is denied.

Based on the foregoing, it is hereby

ORDERED that the termination date set forth in the subject Fifteen (15) Day Notice to Cure dated November 28, 2023 is tolled and defendant, any of its agents, servants, officers, directors, and employees and all other persons acting in consort with plaintiff, or on its behalf, are restrained from taking any further steps to terminate plaintiff's lease pending the determination of this action, on condition that plaintiff timely pays the rent and other charges in accordance with the terms of the parties's lease, throughout the course of this litigation.

ORDERED that plaintiff's second cause of action, for anticipatory breach of contract, be dismissed. It is further

ORDERED that plaintiff shall serve a copy of this Decision and Order upon defendant, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: Bronx, New York
April 12, 2024

Hon. ____________________
FIDEL E. GOMEZ, J.S.C.