

**City Souvenirs on Fashion Ave. Inc. v  
Texwood Inv., Inc.**

2025 NY Slip Op 32562(U)

July 3, 2025

Supreme Court, New York County

Docket Number: Index No. 652282/2025

Judge: Mary V. Rosado

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

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CITY SOUVENIRS ON FASHION AVENUE INC.

Plaintiff,

- v -

TEXWOOD INVESTMENT, INC.,

Defendant.

INDEX NO. 652282/2025

MOTION DATE 04/10/2025

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 17, 18, 19, 20, 22, 23, 24, 26, 27, 28, 29

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR

Upon the foregoing documents, and after a final submission date of May 6, 2025, Plaintiff City Souvenirs On Fashion Avenue Inc.'s ("Plaintiff") motion for a Yellowstone injunction enjoining Defendant Texwood Investment, Inc. ("Defendant") from terminating the lease entered between Plaintiff and Defendant dated November 22, 2023, from taking any steps to evict Plaintiff or to interfere with Plaintiff's possession of the leased premises, and staying and tolling the expiration of the cure period set forth in Defendant's Notice to Cure dated March 27, 2025, is granted on the condition that Plaintiff continues to pay use and occupancy at the rate agreed by the parties in their lease.

Defendant owns the building located at 850 7th Avenue, New York, New York (the "Building"). Pursuant to a lease dated November 22, 2023 (the "Lease"), Defendant leased to Plaintiff's predecessor-in-interest a portion of the basement, the ground floor known as "Retail 101" and the second floor of the Building (the "Leased Premises") for a ten year term (NYSCEF Doc. 4). The same day the Lease was entered, the Lease was assigned to Plaintiff from non-party City Souvenirs on 7th Avenue Inc. with the consent and approval of Defendant (NYSCEF Doc. 5).

Allegedly, once Plaintiff took possession, it learned there was no meter pan to accommodate an electric meter, leading to no power, heat, or essential services in the Building. Allegedly, Defendant did not take any steps to remedy this condition, despite Defendant allegedly representing in Section 7(e) of the Lease that there was a meter pan to accommodate an electric meter for the supply of electricity to the Building. Plaintiff alleges because the Premises lacked electricity and heat, a water pipe broke and flooded the Premises in December of 2023, damaging Plaintiff's merchandise. According to Defendant, the rent commencement date was deferred to June 1, 2024 as a result of the flooding (NYSCEF Doc. 22).

Plaintiff alleges that since May 2024, it is partially evicted due to ongoing leaks throughout the Building. As a result, Plaintiff withheld rent and attempted to negotiate arrears and the rent commencement date with Defendant. In response, on February 27, 2025, Defendant drew down from Plaintiff's \$237,000.00 security deposit, which Plaintiff objected to in a letter dated February 28, 2025. Defendant then sent Plaintiff a notice to cure dated March 27, 2025. The notice to cure claimed Plaintiff was in default for failure to pay rent and for failure to replenish the security deposit. The notice stated if Plaintiff failed to remedy its defaults within five days, Defendant would serve a notice of cancellation of the Lease.

Plaintiff alleges there was no demand to replenish the security deposit as required by Section 21(b) of the Lease, which is a condition precedent to serving a notice to cure. Nonetheless, Plaintiff claims it is willing and able to cure any alleged defaults should this Court find Plaintiff is in default. On April 10, 2025, Plaintiff commenced this action and moved, by Order to Show Cause, asking this Court for a *Yellowstone* injunction to preserve its lease interest while this Court determines the propriety of Defendant's notice of default. Plaintiff also requested a temporary

restraining order essentially granting *Yellowstone* relief during the pendency of the Court's determination on Plaintiff's Order to Show Cause.

On April 15, 2025, this Court held oral argument on Plaintiff's request for interim relief, and granted Plaintiff a temporary restraining order on the condition that Plaintiff paid use and occupancy, *pendente lite* at the monthly rate of \$39,500.00 until this Court determine whether to issue a *Yellowstone* injunction (NYSCEF Doc. 18). The Order to Show Cause has now been fully briefed, and the Court, having carefully considered the parties' submissions, grants Plaintiff a *Yellowstone* injunction on the condition Plaintiff continues paying use and occupancy at the rate agreed to by the parties in their Lease.

Plaintiff's motion for a *Yellowstone* injunction is granted. The standard in granting a *Yellowstone* injunction is far less onerous than that of a preliminary injunction, and requires the party seeking the injunction to show:

“(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”

(*Wharton-Bickley v 388 Broadway Owners LLC*, 273 AD3d 72, 78 [1st Dept 2025] quoting *Graubard Mollen Horowitz Pomeranz & Shapiro*, 93 NY2d 508, 514 [1999]).

Here, Defendant does not dispute that the first three requirements of a *Yellowstone* injunction have been met (*see* NYSCEF Doc. 24). Defendant disputes the fourth requirement, arguing that Plaintiff only states it is “able” to cure the default – rather than stating it is ready, willing and able (*Id.*). The Court finds this argument to be engaging in semantics and is insufficient to deny Plaintiff *Yellowstone* relief. Indeed, the Court can infer that Plaintiff is ready, willing and able to cure the alleged default in light of the fact that Plaintiff has been paying use and occupancy

*pendente lite* at a rate set by the Lease per this Court's temporary restraining order. Therefore, Plaintiff's request for a *Yellowstone* injunction is granted.

Defendant requests that if this Court grants injunctive relief, the relief should be conditioned upon continued payment of use and occupancy. While this Court ordered Plaintiff to pay use and occupancy at the fixed rent rate of \$39,500 per month *pendente lite*, Defendant argues that the fixed rent increased to \$40,685.00 on June 1, 2025, and will increase annually thereafter, and requires Plaintiff to pay other charges as additional rent. Plaintiff argues that because it has been partially evicted from the Premises, any payment of use and occupancy should be conditioned on paying 50% of the rent outlined in the Lease.

A court has broad discretion in awarding use and occupancy (*Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124 [1st Dept 2000]). "The award of use and occupancy during the pendency of an action or proceeding 'accommodates the competing interests of the parties in affording necessary and fair protection to both'" (*MMB Associates v Dayan*, 169 AD2d 422 [1st Dept 1991] quoting *Eli Haddad Corp. v Cal Redmond Studio*, 102 AD2d 730, 731 [1st Dept 1984]). "[A] dispute concerning the amount of rent owed is no reason to allow a tenant to occupy the landlord's real property gratis" (*Levinson v 390 West End Associates, L.L.C.*, 22 AD3d 397, 403 [1st Dept 2005]). Payment of use and occupancy by a retail business in possession of the landlord's property while a *Yellowstone* injunction is in place is appropriate (*Gap, Inc. v 44-45 Broadway Leasing Co., LLC*, 191 AD3d 549, 550 [1st Dept 2021]).

The record is unclear regarding the extent of Plaintiff's alleged constructive eviction. Plaintiff alleges there are ongoing leaks which deprive it of use of portions of the Premises. Although Plaintiff provided photos from the December 2023 flood, there are no photographs provided of the leaks leading to the alleged May 2024 constructive eviction. Nor has Defendant

shown the leaking condition is so pervasive or severe so as to deprive Plaintiff of use of part of the Premises. Therefore, the Court finds there is insufficient basis to order use and occupancy at 50% of the rent set by the Lease, as requested by Plaintiff, or for fixed rent and additional rent as requested by Defendant. The Court finds use and occupancy *pendente lite* at the fixed base rent agreed by the parties in their Lease is appropriate (*Mushlam, Inc. v Nazor*, 80 AD3d 471, 472 [1st Dept 2011] [“in determining the reasonable value of use and occupancy, the rent reserved under the lease, while not necessarily conclusive, is probative”]).<sup>1</sup> To the extent the parties dispute this rate, the remedy for any over or underpayment of use and occupancy is a speedy trial (*Ballinteer Corp v SNRP West 37 LLC*, 217 AD3d 597, 598 [1st Dept 2023]). If, during the pendency of this litigation, Plaintiff prevails on its causes of action alleging constructive and partial eviction, Plaintiff may be entitled to a credit based on use and occupancy paid.

Accordingly, it is hereby,

ORDERED that Plaintiff’s motion for a *Yellowstone* injunction is granted, and Defendant and its agents are enjoined from taking any action to terminate or cancel the commercial lease between Plaintiff and Defendant, dated November 22, 2023, and from commencing any proceeding to evict Plaintiff or interfere with Plaintiff’s possession of a portion of the basement, ground floor known as Retail 101, and the second floor in the building located at 850 7<sup>th</sup> Avenue, New York, New York; and it is further

ORDERED that the expiration of the cure period set forth in Defendant’s notice to cure to Plaintiff dated March 27, 2025 is stayed and tolled *nunc pro tunc* until the resolution of this action; and it is further

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<sup>1</sup> To be clear, the award of Use and Occupancy **does not** include additional rent which may be charged to Plaintiff under the Lease. It only includes the fixed base rent.

ORDERED that the foregoing relief is granted on the condition that Plaintiff pay Defendant ongoing use and occupancy, *pendente lite*, at the fixed monthly base rent agreed to by the parties. Monthly payments of \$39,500 shall be made on or before the 25<sup>th</sup> day of each month beginning on July 25, 2025 and continuing until this litigation has resolved or until the parties stipulate otherwise; and it is further

ORDERED that the parties shall meet and confer immediately and submit a proposed preliminary conference order to the Court via e-mail to [SFC-Part33-Clerk@nycourts.gov](mailto:SFC-Part33-Clerk@nycourts.gov), but in no event shall the proposed order be submitted any later than August 13, 2025;<sup>2</sup> and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

7/3/2025 DATE	<u>Mary V Rosado JSC</u> HON. MARY V. ROSADO, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> REFERENCE
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	

<sup>2</sup> This date is for the submission of a proposed preliminary conference order only. It is not to appear for a conference. If the parties have a serious discovery dispute requiring Court intervention, they shall contact the Court via e-mail to [SFC-Part33-Clerk@nycourts.gov](mailto:SFC-Part33-Clerk@nycourts.gov) to be provided a date for an in-person conference.