

**G-CNY Group LLC v 1440 Broadway (NY) Owner,
LLC**

2025 NY Slip Op 32576(U)

July 7, 2025

Supreme Court, New York County

Docket Number: Index No. 653196/2025

Judge: Emily Morales-Minerva

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

PRESENT: HON. EMILY MORALES-MINERVA PART 42M

Justice

-----X

G-CNY GROUP LLC

Plaintiff,

- v -

1440 BROADWAY (NY) OWNER, LLC,

Defendant.

-----X

INDEX NO. 653196/2025

MOTION DATE 05/23/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27

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

Appearances

Belkin Burden Goldman, LLP (Mark Nathan Antar, Esq.) for the plaintiff.

Stern Tannenbaum & Bell, LLP (Karen S. Frieman, Esq.) for the defendant.

HON. EMILY MORALES-MINERVA, J.S.C.,

In this action for a permanent injunction and declaratory relief, plaintiff G-CNY GROUP LLC (commercial tenant) moves, by order to show cause (motion sequence number 001), for a Yellowstone injunction, enjoining and restraining defendant 1440 BROADWAY (NY) OWNER, LLC (owner-landlord) from terminating the commercial lease between the parties pending final determination of the cause of action. Owner-landlord opposes the injunction, and filed a cross-motion (motion sequence number 002) seeking, among other things, dismissal of the complaint pursuant to CPLR

§ 3211 (a)(7), an award of use and occupancy in the amount of \$184,302.08 per month pursuant to RPL § 200, and attorneys' fees (see NYSCEF Doc. No. 15, Notice of Cross-Motion). Commercial tenant filed a reply (see NYSCEF Doc. No. 25, Reply Affirmation of Mark N. Antar in opposition of cross-motion; see also NYSCEF Doc. No. 26, Reply Affirmation of Jirm Wurm in opposition to cross-motion).

This court granted commercial tenant a Temporary Restraining Order, enjoining defendant from terminating the lease (see New York State Court Electronic Filing System [NYSCEF] Doc. No. 13, Order to Show Cause, with interim relief requested, dated June 2, 2025). The court also marked the order to show cause (motion seq. no. 001) returnable in Part 42M, 111 Centre Street, New York, New York, on June 30, 2025 at 11:00 AM.

At the call of the calendar, commercial tenant and landlord appeared, by counsel. The Court heard oral arguments and marked the motion (sequence no. 001) submitted for determination.

Now, for the reasons set forth below, the Court denies commercial tenant's request for a Yellowstone injunction and vacates the temporary injunction. Further, as the cross-motion (motion seq. no. 002) presents no emergency, the court marks that motion submitted on a regular motion schedule for disposition.

In First Natl. Stores v Yellowstone Shopping Ctr., 21 NY2d 630 [1968], the Court of Appeals held that -- where a commercial tenant fails to obtain a temporary restraining order prior to the expiration of the cure period in its lease -- the courts are powerless to extend the cure period and revive the lease. From this hard lesson, came a tenant practice "of obtaining a stay of the cure period before it expired to preserve the lease until the merits of the dispute could be resolved in court" (Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs., 93 NY2d 508, 514 [1999] [Wesley, J.]; see also 159 MP Corp v Redbridge Bedford, LLC, 33 NY3d 353, 366 [2019] [citation and quotations omitted] [providing, among other things, that, "[i]n the wake of" First Natl. Stores, supra, "tenants challenging notices of default in declaratory judgment actions 'developed the practice of obtaining a stay of the cure period' . . .]).

Inspired by First Natl. Stores v Yellowstone Shopping Ctr. (21 NY2d 630), this type of injunction came to be known as the Yellowstone injunction (see id.). The Court of Appeals has "described the Yellowstone injunction as a 'creative remedy' crafted by lower courts . . ." (159 MP Corp, supra, 33 NY3d at 366). The general purpose of which is as follows:

"[To maintain] the status quo so that the commercial tenant . . . may protect its investment in the leasehold by obtaining a stay tolling the cure period [] before it expired to preserve the lease until the

merits of the dispute could be resolved in court"

(Graubard, supra, 93 NY2d at 514).

"The Yellowstone injunction is an important adjunct to . . . [a] declaratory judgment action, in which a tenant threatened with eviction based on debatable claims of breach may obtain a judicial resolution of the debate before deciding whether to cure, to remain with no need to cure, or to accept eviction" (159 MP Corp, supra, 33 NY3d at 382 [Rowan, Ch. J., dissenting]).

A party seeking a Yellowstone must establish:

"(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, 237 AD3d 72, 78 [1st Dept 2025] [emphasis added], quoting Graubard, supra, 93 NY2d at 514 and Elite Wine & Spirit LLC v Michaelangelo Preserv. LLC, 213 AD3d 143, 148 [1st Dept 2023]).

Here, commercial tenant established the first three prongs, which are undisputed. First, plaintiff G-CNY GROUP, LLC, is the commercial tenant of the fourth floor of defendant 1440 Broadway (NY) OWNER, LLC's property known as 1440 Broadway, New York, New

York. Second, on or around March 26, 2025, defendant served plaintiff with a Notice of Default, for failing to pay \$2,686,348.24 in rent, reserving its right to terminate the lease if plaintiff did not cure the default within ten days of such service. Plaintiff concedes that it received the Default Notice on March 31, 2025 (see NYSCEF Doc. No. 11, Memorandum of Law, at p 2-3)).

Upon plaintiff's request, defendant extended the cure period "to May 23, 2025" (id., at p 3). On that date, however, plaintiff commenced this action for (1) a permanent injunction, prohibiting defendant from terminating its lease based on the allegations as set forth in the Notice of Default, and for (2) a declaratory judgment that the default notice is legally insufficient to serve as a predicate notice for termination of the lease (see NYSCEF Doc. No. 01, Summons and Complaint, dated May 23, 2025).

Adjunct to the summons and complaint, plaintiff filed the subject motion, by order to show cause, seeking a Yellowstone Injunction (see NYSCEF Doc. No. 002, dated May 23, 2025). This constitutes the fulfilment of the third prong -- commercial tenant requested injunctive relief prior to the termination of the lease.

The issue is that commercial tenant failed to satisfy the fourth element for the issuance of a Yellowstone injunction: a

showing that "it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises" (Wharton-Bickley, supra, 237 AD3d at 78 [quotations and citations omitted]). For this prong, plaintiff relies solely on the affirmation of Jim Wurm, who is identified only as "an authorized signatory of" commercial tenant (NYSCEF Doc. No. 003, affirmation of Jim Wurm in support of plaintiff's application for a Yellowstone injunction, dated May 23, 2024).

Jim Wurm states: (1) "We are ready, willing and able to cure, and desire to so cure, any condition claimed in the Default Notice that is ultimately determined to be a default under the Lease" (id. at ¶ 8 [emphasis added, as Jim Wurm does not identify himself as having any role in plaintiff's company or business]). Wurm also states: (2) "At all times Plaintiff has emphasized that it has the ability and is prepared and desires to cure any alleged defaults. This remains Plaintiff's position at the time of filing" (id. at ¶ 14).

These two statements, according to Jim ~~Wurm~~, are based on "my [Jim Wurm's] personal knowledge of the facts and my [Jim Wurm's] review of my [Jim Wurm's] files and all the writings relevant to this action" (id. at ¶ 1).

However, a review of a case file or personal files does not equate to firsthand knowledge of facts concerning commercial tenant's willingness and ability to cure the financial default,

which is undisputed (see generally Guzetti v City of New York, 32 AD3d 234, 236 [1st Dept 2006]; see also Babikan v Nikki Midtown, LLC, 60 AD3d 470, 472 [1st Dept 2009]). Jim Wurm's conclusory statements essentially amounts to the affiant repeating the unsupported contentions of commercial tenant. But a tenant cannot merely say it is willing and able to cure a defect for purposes of a Yellowstone injunction.

"The proper inquiry [for the court] is whether a basis exists for believing that the tenant desires to cure and has the ability to do so" (Herzfeld & Stern v Ironwood Realty Corp., 102 AD2d 737, 738 [1st Dept 1984] [emphasis added]; see also Wharton-Bickley, 237 AD3d 72, 78 [1st Dept 2025] [citing Hertfeld as controlling]; 2017 US Dist LEXIS 155142, *11, quoting Cemco Restaurants, Inc. v Ten Park Ave. Tenants Corp., 135 AD2d 461, 463 [1st Dept 1987]; ACIM NY, LLC v Nissan N. Am., Inc., 2017 US Dist LEXIS 155142, *11 [SD NY 2017] ["the tenant does not need to 'prove its ability to cure,' but rather, the tenant must show that 'a basis exists for believing that the tenant has the ability to cure'"], quoting Cemco Restaurants, Inc. v Ten Park Ave. Tenants Corp., 135 AD2d 461, 463 [1st Dept 1987]).

Here, commercial tenant has proffered no such basis upon which this court can be convinced of its desire and ability to cure the default. Further, the record "raises considerable

doubt as to [commercial] tenant's good faith" which the First Department appears to have recognized as important to the analysis of a Yellowstone injunction (Cemco, supra, 135 AD2d at 463 [1st Dept 1987]). Commercial tenant admitted, on record, that it is in breach of the lease, conceding that it is in monetary default in the amount of \$2,580,229.12. This amount by comparison is only \$106,119.12 less than the amount set forth in the Notice of Default for failure to pay rent. However, commercial tenant -- also admitingly -- has paid zero amount of the rent due or rent in arrears, since May 2024, without any excuse given.

Accordingly, it is hereby

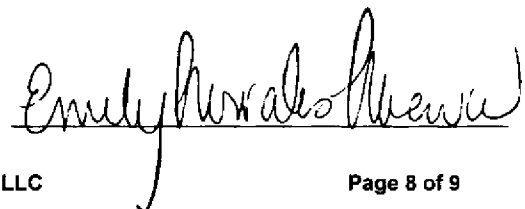
ORDERED that the plaintiff's motion, by Order to Show Cause (motion sequence no. 001), seeking a Yellowstone injunction, is denied; it is further

ORDERED that the Temporary Restraining Order issued by this court, dated June 2, 2025, is vacated forthwith in its entirety; and it is further

ORDERED that defendant's cross-motion to dismiss is marked fully submitted as of today, July 07, 2025; and it is further

ORDERED that the Clerk of the Court shall mark the file accordingly.

Date: 07/07/2025



7/7/25
DATE

Emily Morales-Minerva

EMILY MORALES-MINERVA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE