

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

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CHANGE YOUR LIFE LLC ,	:	Index No.:
	:	157335/2020
	:	
Plaintiff,	:	
	:	<u>AFFIDAVIT</u>
-against-	:	
	:	
E16 BY 1771 HOLDINGS LLC,	:	
	:	
Defendant.	:	
-----X		
STATE OF NEW YORK	}	
	} ss.	
COUNTY OF NEW YORK	}	

Christopher Murray, being duly sworn, deposes and says:

1. I am the chief operating officer of Change Your Life LLC, commonly known as Grit BXNG, the Plaintiff in this action (the "Tenant"). As such, I am fully familiar with the facts and circumstances as set forth below.
2. This affidavit is submitted in support of Tenant's application for "Yellowstone" injunctive relief enjoining the Defendant, 9E16 BY 1771 Holdings LLC, the Tenant's landlord (the "Landlord") from taking any further steps to terminate Tenant's lease based upon a Fifteen (15) Day Notice to Cure dated August 25, 2020 (the "Notice"). Annexed hereto as **Exhibit "A"** is a copy of the Notice.
3. The Notice requires a cure by Monday, September 14, 2020.
4. The Court's intervention is urgently needed to preserve the Tenant's lease.

PRELIMINARY STATEMENT

5. The landlord is seeking to terminate the Tenant's lease during the pandemic based upon a failure to replenish security that the Landlord applied to rent arrears.
6. Due to the COVID-19 Pandemic, the Tenant, a boutique fitness center has been closed pursuant to the Governor's Executive Order No. 202.6.
7. It is unjust and inequitable to threaten to terminate the Tenant's lease during these difficult times.
8. Indeed, that is why the Governor prohibited by Executive Order No. 202.28 the initiation of proceedings for non payment of rent.
9. The Landlord's Notice is an initiation of proceedings based upon non-payment of rent that is prohibited by Executive Order 202.28.
10. This application is presented on an emergency basis because our valuable, long-term lease is in peril which we have spent substantial sums outfitting and marketing.
11. The Tenant is a small family operated business. The Tenant's principal, Bill Zanker, in addition to his daughter and son, actively operate the business.
12. The family's life savings of over \$3,000,000.00 have been invested into this business.
13. The tenancy should not be terminated in contravention of public policy directives to prevent termination of such tenancies in the midst of a brutal, unrelenting, global pandemic.
14. Accordingly, the Court's intervention is urgently needed to preserve the Tenant's long term lease, employees, and valuable leasehold improvements totaling some 3 million dollars.

BACKGROUND

15. The Tenant is a boutique fitness center that also includes a bar specializing in supervised, curated high intensity workouts with boxing sequences at its core.

16. Our combination bar and boutique fitness center distinguishes us from all other fitness center in New York City. Both the bar and our fitness center remain closed due to the pandemic.
17. The Tenant entered into possession pursuant to a 15 year Lease dated July 19, 2018 for the premises located at 9 East 16th Street, New York, New York. Annexed hereto as **Exhibit "B"** is a copy of the governing Lease.
18. The use clause (Article 41) requires the tenant to operate "a fitness center/boutique boxing gym and for no other use or purpose".
19. In connection with the permitted use, the Tenant can also serve food and beverages.
20. To create the fitness center, the Tenant spent approximately \$3,000,000.00.
21. The renovations took longer than anticipated and accordingly the Landlord agreed to an amendment of the Lease in May, 2019. Annexed hereto as **Exhibit "C"** is a copy of the Amendment to Lease dated May 14, 2019.
22. On March, 7, 2020, the Governor issued Executive Order No. 202 that declared a state of emergency and implemented social distancing requirements.
23. The Tenant's business almost immediately began to decline as result of these restrictions.
24. On March 16, 2020, the Governor issued executive Order 202.3 that required all gyms and fitness centers to close effective March 16, 2020.
25. The gym and fitness closures remain in effect in New York City for fitness centers such as Plaintiff's, with fitness "classes".
26. Inasmuch as indoor fitness classes are prohibited in New York City, the Tenant, a boutique fitness center, remains closed.
27. As a result of these occupancy restrictions, the Tenant is facing a severe financial hardship.

28. The pandemic and resulting restrictions implemented by the Governor has made it impossible for us to operate our business.
29. The agreed upon rent is predicated upon a vibrant New York City with no social distancing regulations.
30. Nobody anticipated a global pandemic that would result in a mass exodus from New York City and forced a closure of all gyms and fitness centers.
31. The Lease should therefore be reformed based upon the occupancy restrictions imposed under the Governor's Executive Orders.
32. This Yellowstone application for "Yellowstone" injunctive relief followed. Annexed hereto as **Exhibit "D"** is a copy of the summons and complaint.

YELLOWSTONE INJUNCTIVE RELIEF URGENTLY NEEDED

33. Counsel advises that in order to obtain Yellowstone injunctive relief, a tenant must demonstrate the following: (1) the existence of a valid commercial lease, (2) the service of a Notice to Cure, (3) the cure period in the Notice has not expired, and finally (4) that this plaintiff has the ability to cure.
34. The Tenant meets this four (4) prong test and accordingly this application should be granted.
35. The parties entered into a "15" year lease on or about July 19, 2018. See exhibit "B".
36. Thus, the Tenant satisfied the first prong of the test for Yellowstone relief, namely a commercial lease.
37. The Landlord served the Notice on or about August 25, 2020.
38. The Notice requires a cure by Monday, September 14, 2020.

39. Therefore, the Notice has not yet expired. The Tenant has therefore met the second and third prongs for Yellowstone injunctive relief.
40. The Landlord's Notice demands that the Tenant replenish its security deposit totaling \$250,000.00.
41. Due to the pandemic, the Tenant was required to close its business.
42. Fortunately to protect tenants, the Governor issued Executive Order 202.28 which provides in pertinent part as follows:

There shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for non payment of rent or a foreclosure of any residential or commercial mortgage, for non payment of such mortgage, owned or rented by someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020.

43. I have annexed hereto as **Exhibit "E"** a copy of Executive Order 202.28.
44. Executive Order 202.28 was signed on May 7, 2020.
45. By notice dated August 3, 2020 and entitled Fifteen Day Notice To Replenish Security Deposit, the Landlord drew down on the security and applied same to rent arrears. See exhibit "A".
46. The Landlord then demanded replenishment of the security by August 22, 2020.
47. Thereafter, the Landlord served the Notice threatening termination of Plaintiff's tenancy.
48. The Landlord's action is an initiation of proceedings masquerading as a demand to replenish security. The Landlord's initiation of proceedings for rent is directly prohibited by Executive Orders.
49. Moreover, as to commercial tenants, Executive Order 202.28 has been extended through October 4, 2020 by Executive Order 202.60.

50. Moreover, as evidenced by the Landlord's rent ledger attached to the Notice, the Tenant paid the base rent through February, 2020 leaving an alleged balance due totaling \$6,015.72.
51. The alleged arrears include late fees totaling 5% per month.
52. This represents an unenforceable and commercially unconscionable interest rate of 60% per year. Executive Order No. 202.28 also prohibits late fees during the pandemic.
53. The Tenant is also entitled to a burndown on the security pursuant to Article 74 of the Lease and an abatement of rent pursuant to Article 9 of the Lease inasmuch as the pandemic is a casualty that rendered the premises unusable.
54. The Tenant is ready, willing, and able to cure the alleged lease defaults should the Court determine that a tenancy can be terminated for non payment of rent, notwithstanding Executive Order No. 202.28 as extended, as well as the common law doctrine of frustration of purpose.
55. The Tenant has the ability to generate the necessary revenues once occupancy restrictions are lifted.
56. Moreover, the Tenant is also prepared to secure the necessary funding to cure any monetary default.

CONCLUSION

57. While the Tenant vigorously disputes that the Landlord has the right to terminate the tenancy based upon the Notice during the pandemic, the Tenant is prepared to undertake all necessary and reasonable steps to "cure" the alleged leasehold default.
58. Accordingly, the instant application should be granted.

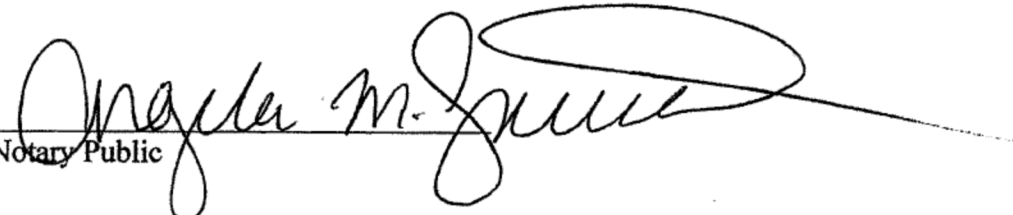
NO PRIOR APPLICATION

59. No prior application for the specific relief sought herein has previously been made to this or any other Court.

WHEREFORE, the Plaintiff respectfully requests that its application be granted in its entirety, together with such other and further relief as to the court seems just and proper.


Christopher Murray

Sworn to before me this
10 day of September, 2020


Notary Public

