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

CHANGE YOUR LIFE LLC,

Plaintiff,

-against-

9E16 BY 1771 HOLDINGS LLC,

Defendant.

Index No. 157335/2020

MEMORANDUM OF LAW IN OPPOSITION TO APPLICATION FOR YELLOWSTONE INJUNCTION

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PRELIMINARY STATEMENT

Defendant E16 By 1771 Holding LLC ("Defendant" or the "Landlord") submits this Memorandum of Law in opposition to the motion made by Plaintiff Change Your Life LLC ("Plaintiff" or the "Tenant") for a *Yellowstone* injunction tolling the running of a certain Notice to Cure and staying Landlord from taking any further steps to terminate Plaintiff's tenancy and to remove it from possession. Plaintiff also seeks a judicial determination that the Notice to Cure is improper and/or that its service contravenes an executive order.

As shown below, the Tenant cannot satisfy the *Yellowstone* criteria and, therefore, the motion should be expeditiously denied. Moreover, even were the Court disinclined to deny the motion, the grant of *Yellowstone* relief should be conditioned upon the Tenant posting an undertaking and paying use and occupancy *pendente lite*.

STATEMENT OF FACTS

For the facts and circumstances attendant to this action, the court is respectfully directed to the affidavit of Bindii Churaman-Jadoo sworn to on October 2, 2020 together with the applicable exhibits.

ARGUMENT

POINT I:
TENANT IS NOT ENTITLED TO YELLOWSTONE RELIEF

It is well settled that to obtain a *Yellowstone* injunction tolling the running of a Notice to Cure, the Tenant must show 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 and Shapiro v. 600 Third Avenue Associates*, 93 N.Y.2d 508, 514 (1999).

In this matter, the Tenant has breached a substantial obligation of the tenancy by failing to replenish the $250,000.00 security deposit required by the Lease agreement it made with the Landlord, and has failed to demonstrate that it maintains the ability to cure this default[1]. Accordingly, Tenant cannot satisfy the fourth prong of the *Yellowstone* criteria and, therefore, its request for *Yellowstone* relief should be denied.

[1] While not the basis for the service of the Notice to Cure, it should be noted that through the date of this submission, Tenant owes $168,238.08 in base rent and additional rent.

A. Executive Order 202.28, As Extended By Executive Orders 202.48, 202.57 and 202.64, Is Inapplicable And Does Not Excuse The Tenant's Uncured Breach of Lease

Although Tenant seeks equitable relief, it does not come before this court with clean hands. In this matter, there is one critical, undisputed fact: Tenant is in violation of Section 74 of the Lease due to its admitted failure to replenish the $250,000.00 security deposit required by the Lease. Unable to deny this fact, Tenant seeks to misdirect the inquiry before this court by asserting a red herring.

According to Tenant, the Landlord's Notice of Cure was served in violation of Executive Order 202.28 which provides in pertinent part:

> 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 of federal law or otherwise facing financial hardship due to the Covid-19 pandemic for a period of sixty days beginning on June 20, 2020.

This temporary "moratorium" has been extended first through August 20, 2020 by Executive Order 202.48, then through September 20, 2020 by Executive Order 202.57, and now until October 20, 2020 by Executive Order 202.64. However, as a matter of statutory construction, it is clear that this moratorium has no bearing on the case at bar.

The Court of Appeals has instructed that "in construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add or to take away from that meaning." *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y. 2d 577, 583 (2005). Here, neither the initiation nor enforcement of a non- payment proceeding is implicated by the service of the Notice to Cure.

First, Landlord has not commenced any proceeding against the Tenant. Rather, it is the Tenant that has commenced the instant action against the Landlord. In this regard, it bears noting that neither in its papers in support of its application, nor in its complaint, does Tenant deny that (i) it has failed to replenish the security deposit as required by the Lease or (ii) that such failure is anything other than a violation of a substantial obligation of the tenancy.

Second, there is no proceeding to enforce an eviction against this Tenant for non-payment of rent. Tenant has not been served with a rent demand or a Notice of Petition and Petition for non- payment of rent. Accordingly, Tenant's attempt to rely upon the inapplicable Executive Order and use it as a shield to excuse its plain default should be rejected as the Lease should be enforced as written.

B. Section 74 Of The Lease Agreement Between The Parties Must Be Enforced As Written

Section 74 of the Lease, upon which the Notice to Cure is actually based, provides in pertinent part as follows:

> Security. Tenant, as security for Tenant's compliance with this Lease, will deliver a security deposit of five months' Base Rent, initially $250,000.00 (the "Security") to Owner.
>
> …
>
> If there is a default by Tenant beyond applicable notice, grace and cure periods, Owner may use all or any portion of the Security to cure Such default or for the payment of any other amount due and payable from Tenant and Owner in accordance with this Lease

Continuing:

> Tenant must, within 15 days following Owner's application of any portion of the Security, deposit with Owner an amount sufficient to restore the full amount of the Security.

Tenant must be held to the mandatory provisions of Section 74 of the Lease that it freely negotiated with the Landlord as it remains well settled that "the public policy in New York is to respect negotiated commercial leases." *Accurate Copy Service of American Ins. v. Fisk Building Assoc.*, 72 A.D.3d 456 (1st Dept. 2010). Indeed, "parties to a lease are not foreclosed from contracting as they please." *Holy Props. LP v. Kenneth Cole Prods. Inc.*, 87 N.Y.2d 130, 134 (1995).

Just recently, the Court of Appeals reaffirmed the "familiar and eminently sensible proposition of law [ ] that when parties set down their agreements in a clear, complete document, their writing should be enforced according to its terms". *159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.39 353, 358 (2019) quoting from *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004). Moreover, "this rule has special import in the context of real property transactions, where commercial certainty is a paramount concern, and where the instrument was negotiated between sophisticated counseled business people negotiation at arms length." *Id.* at 359 (citation and internal quotation marks omitted).

Application of these settled principles mandates a finding that Section 74 of the Lease must be enforced as written as Section 86 thereof titled, "Interpretation" states that "[t]his Lease will be deemed to have been jointly drafted, on an arm's length basis, by both Tenant and Owner and their counsel and no inference will be drawn based on a claim that one party drafted this Lease."[2]. And because Section

[2] Application of these same principles dooms another of the Tenant's sleight of hand, namely, that it should be excused from its lease breach because Section 42 of the Lease provides for a rather standard 5% late charge for failure to timely tender rent or additional rent (see Murray aff. at paras. 51-52). Parenthetically, Tenant's claim that Executive Order 202.28 excuses the imposition of late fees from March 20, 2020 through August 20, 2020 is incorrect. The Executive Order affects Real Property Law § 238-a, which expressly applies only "to a residential dwelling unit."

74 is binding and Tenant is in acknowledged breach thereof, its empty promise to replenish the security deposit at some unknown time in the future is insufficient to warrant *Yellowstone* relief.

C. The Doctrine of Frustration of Purpose Does Not Apply

Tenant cannot excuse its uncured default by claiming that the doctrine of frustration of purpose excuses its compliance with the Lease. Unlike here, this doctrine applies when a change in circumstances makes one party's performance virtually worthless to the other, thereby frustrating the purpose in making the contract. *PPF Safeguard, LLC v. BCR Safeguard Holding*, LLC, 85 A.D.3d 506 (1st Dept 2011). Frustration of purpose is "limited to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party." *U.S. v. Gen. Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377 (2d Cir. 1974). "It is not enough that the transaction has become less profitable for the affected party or even that the affected party will sustain loss." *Rockland Development Assocs. V. Richlou Auto Body, Inc.,* 173 A.D. 2d 690,691 (2d Dept. 1991). Accordingly, Tenant who wishes to remain in possession during the term of the Lease but be excused from complying with its provisions for an indefinite period of time, cannot rely upon this doctrine to excuse the fact that it has wholly failed to demonstrate that it has any ability to cure its breach.

D. Tenant Cannot Establish That It Maintains The Ability To Cure

As previously noted, the fourth prong of the *Yellowstone* test requires the Tenant to demonstrate that "it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises." *Graubard, supra* 93 N.Y.2d at 514.

A review of the affidavit submitted by Christopher Murray, the chief operating officer of the Tenant, reveals empty promises, at best, and disingenuous argumentation, at worst. For example, Murray asserts at paragraph 54 of his affidavit that "[t]he 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."* (emphasis added) This conditional "promise" is a phony promise in that the Notice to Cure sets forth a breach for failure to replenish a security deposit, not non-payment of rent, and the frustration of purpose doctrine does not apply to the facts at bar.

Additionally, Mr. Murray baldly asserts at paragraph 55 of his affidavit that "[t]he tenant has the ability to generate necessary revenue once occupancy restrictions are lifted." However, Mr. Murray provides no proof of the Tenant's prior revenues and, more importantly, or when the Tenant will be able to actually

generate enough revenue to replenish the $250,000.00 security deposit, much less pay the rent which continues to accrue at the rate of $51,500 per month. Indeed, Mr. Murray does not even hazard a guess as to when any financial commitment can or will be made. In the meanwhile, Landlord has pressing financial responsibilities such as mortgage commitments, insurance premiums, building maintenance, payment of personnel and the like that have not been, nor will be, suspended.

Also empty is the statement contained at paragraph 56 of the Murray affidavit where he alleges that "[t]he Tenant is also prepared to secure the necessary funding to cure any monetary default."

This begs the question of why Tenant has failed to demonstrate what steps it has already taken to secure the necessary funding to satisfy its substantial obligations to the Landlord. No proof has been provided that it has even taken preliminary steps in this regard. Plainly, an affirmative showing rather than merely mouthing the "Yellowstone language" is required to obtain relief.

It is understandable, but unavailing, that the Tenant has sought to portray itself in the most sympathetic light to this court and requests that it be granted equitable relief notwithstanding its phony argumentation and failure to make the requisite showing. But sympathy is no substitute for the law as Tenant is not the

only entity which has allegedly been affected by Covid-19, and one would be hard-pressed to find anyone who has not been so affected. Thus, the contract between the parties here must be enforced as written because the "[s]tability of contract obligations must not be undermined by judicial sympathy." *First Natl. Stores v Yellowstone Shopping Ctr.,*21 N.Y. 630, 638 (1968). Accordingly, based upon the foregoing, Landlord submits that Tenant's application for a *Yellowstone* Injunction should be denied.

D. Yellowstone Conditions

In the event that the court is disinclined to deny the motion, Landlord submits that pursuant to long standing and well settled authority, the tolling of the running of the Notice to Cure should, at a minimum, be conditioned upon (i) the payment of use and occupancy pendente lite and (ii) the posting of a bond.

Use and occupancy is routinely granted in property disputes. The grant is based upon the simple premise that persons in possession of real property of another "should not be entitled to continued occupancy of the premises without paying for its use." *Abright v. Shapiro*, 92 A.D.2d 452, 453 (1st Dept. 1983). Put another way, a tenant is not absolved from the obligation to pay for the space and services he receives as an incidence of possession merely because he is involved in litigation with his landlord. See, e.g., *Corris v. 129 Front Co.*, 85 A.D.2d 176 (1st

Dept. 1980); *Eli Haddad Corp. v. Cal Redmond Studio, Inc.*, 102 A.D.2d 730 (1st Dept. 1984) .

Fairness and necessity underlie these rules: it is economically impossible for landlords to continue to render services indefinitely without receiving rent. *Corris, supra*.

Given these policy concerns, a grant of use and occupancy is a long and well accepted condition to the issuance of a *Yellowstone* injunction in this Department. In the factually similar case of *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs.*, 234 A.D.2d 49 (1st Dep't. 1999), the Appellate Division affirmed the propriety of the grant of use and occupancy in a *Yellowstone* situation. In *Graubard*, commercial tenant (a law firm) was required to maintain a letter of credit which the landlord could draw upon in the case of nonpayment of rent. Attempting to use litigation to renegotiate its lease, the law firm started to withhold its rental payments claiming that it had been actually partially evicted from its premises by virtue of an elevator modernization which landlord had engaged in. Initially, when *Yellowstone* relief was granted, it was conditioned upon the payment of an amount equal to the monthly rent into a joint escrow account. At that time, it was believed that a trial would be held shortly thereafter and the matter would then be expeditiously resolved. Three years later, when trial had still yet to

take place due to the law firm's dilatory tactics and the landlord had received no rental stream for that period, the landlord moved to modify the *Yellowstone* condition to require payment of partial use and occupancy as well as the release of approximately $100,000.00 per month from the escrow account. The trial court granted such relief, and, upon the law firm's appeal, the Appellate Division found that the trial court had properly exercised its discretion in doing so.

In *401 Hotel, L.P. v. MTI/The Image Group, Inc.*, 271 A.D.2d 228 (1st Dept. 2000), *Yellowstone* relief was granted in a commercial dispute. However, after the grant, the landlord moved to modify the condition to provide for the award of all past and ongoing use and occupancy to the landlord. The trial court granted such relief. On appeal, the Appellate Division agreed, noting that the Court:

> …retained jurisdiction after the issuance of the *Yellowstone* injunction to award (landlord) past and ongoing use and occupancy. It would have been unjust to permit (tenant) to remain in possession of, and derive substantial benefits from, the premises for such an extended passage of time without paying rent. (citations omitted) 271 A.D.2d at 230.

The Second Department is in accord. In *Queens Steak Pub, Inc. v. TKU-Queens, Inc.*, 70 A.D.2d 647, 648 (2d Dept. 1979), the Appellate Division, in the context of a *Yellowstone* injunction sought by a commercial tenant, ruled that the

lower court's conditioning of injunctive relief upon the payment of outstanding common maintenance charges was proper. The court stated as follows:

> "…Without passing on the merits of the controversy, we are of the opinion that the conditions precedent that plaintiff pay the common maintenance charges, of which it is in alleged default, and 'each month's common charges as same become due', are appropriate in the circumstances, especially since Special Term directed that the payments be without prejudice to recovery or offset against future rent…"

Pursuant to this authority, Landlord submits that if *Yellowstone* relief is granted, it must be conditioned upon the payment of use and occupancy pendente lite in the sum set forth as monthly rental in the lease. Furthermore, the tenant must be directed to post a bond in the sum of $250,000.00. This sum, the amount which the Tenant is required to maintain as a security deposit to ensure performance of its obligations, is rationally related to the quantum of damages which landlord will sustain if it is later determined that the tenant was not entitled to obtain injunctive relief. See, *61 West 62nd Owners Corp. v. Harkness Apt. Owners Corp.,* 173 A.D.2d 372,373 *(*1st Dept. 1991) Indeed, the posting of the bond is a reasonably tailored response to the exigencies of the underlying landlord-tenant dispute. See, e.g., *Sportsplex of Middletown, Inc. v. Catskill Regional Off-Track Betting Corp.*, 221 A.D.2d 428 (2d Dept. 1985).

Conclusion

Tenant's motion for a *Yellowstone* injunction should be denied, together with such other and further relief as this court deems just and proper.

Dated: New York, New York
October 2, 2020

Respectfully submitted,
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