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

CHANGE YOUR LIFE LLC,	:	Index No.: 157335/2020
Plaintiff,	:	
-against-	:	**REPLY AFFIRMATION**
E16 BY 1771 HOLDINGS LLC,	:	
Defendant.	:	

Fred L. Seeman, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms the following under penalty of perjury:

1. I am the attorney for the Plaintiff in the above captioned action.

2. This reply affirmation is submitted in further support of the Plaintiff's application for "Yellowstone" injunctive relief.

PLAINTIFF EASILY MEETS STANDARD FOR YELLOWSTONE RELIEF

3. The standard for obtaining "Yellowstone" relief is well established.

4. The movant must establish a tenant must demonstrate the following: (1) Plaintiff holds a commercial lease, (2) landlord has served a notice to cure, (3) the cure period set forth in the notice has not expired, and finally (4) Plaintiff has the willingness and ability to cure said default. *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Assoc., 93 NY2d 508, 693 NYS2d 91 (1999).*

5. Here, the Plaintiff must necessarily concede that the Plaintiff has a commercial lease, the landlord served a notice to cure, and the Cure period has not expired.

6. Therefore, Plaintiff's application for "Yellowstone" relief should be granted.

EXECUTIVE ORDER 202.28 PROHIBITS SERVICE OF PREDICATE NOTICE BASED UPON FAILURE TO PAY RENT

7. In response to the pandemic, the Governor declared a State disaster on March 7, 2020.

8. To assist commercial tenants during these difficult times, the Governor issued Executive Order 202.28. Executive Order 202.28, as extended through October 20, 2020 [202.64], provides, in pertinent part, that:

> There shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment 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.

9. The terms "enforcement" and "proceedings" necessarily include service of a predicate notice threatening to terminate a tenancy for failure to replenish a security deposit.

10. A predicate notice is an essential element of a proceeding. In this instance, the predicate notice relates to non-payment of rent.

11. The Governor's Executive Order does not solely preclude the initiation of a summary proceedings for non-payment of rent as argued by the Defendant. Such a narrow interpretation of the Executive Order is not warranted and contrary to the intent of the Executive Order.

12. Indeed, a Court recently granted a "Yellowstone" injunction that included a leasehold default of rent inasmuch as "the Executive Order clearly prohibits the enforcement of a termination of a commercial lease for sixty days commencing June 20, 2020." *Prestige Deli & Grill Corp. v. PLG Bedford Holdings LLC 2020 WL 4059127 (Sup. Kings, 2020).*

13. Moreover, Executive Order 202.8 as extended through November 3, 2020 pursuant to Executive Order 202.67 tolled time limits for any "legal action" which necessarily includes filing Yellowstone injunctions.

14. Equally as important, a showing of a meritorious claim is not required to obtain "Yellowstone" relief providing the tenant is willing to cure any adjudicated leasehold default. *Artcorp Inc. v. Citirich Realty Corp. 124 AD3d 545, 2 NY3d 109 (1st Dept. 2015).*

15. Accordingly, Plaintiff's application should be granted.

PLAINTIFF IS READY, WILLING, AND ABLE TO CURE

16. Case law is clear that a commercial tenant is not required to proves it ability to cure prior to obtaining injunctive relief. *WPA/Parnters LLC v. Port Imperial Ferry 307 AD2d 234 (1st Dept. 2003); Jemaltown of 125th St., Inc. v. Leon Betesh 115 AD2d 381 (1st Dept. 1985).*

17. In *WPA/Partners LLC,* the Court reasoned that the law:

> disfavors a forfeiture and a demonstration of success on the merits is not a perquisite to such relief [cite omitted]. Moreover, the tenant need not at this juncture prove its ability to cure; the proper inquiry is whether a basis exists for believing that the tenant has the ability to cure through any means short of vacating the premises [cite omitted]. *WPA/Partners LLC* at 237.

18. The Plaintiff's moving papers clearly established that the Plaintiff is ready, willing, and able to cure this alleged leasehold by amongst other things, securing financing. Moreover, the Landlord is also aware that a principal of the Tenant has high net worth and the Tenant already spent approximately $3,000,000.00 building out the space.

19. Accordingly, Plaintiff's application should be granted.

FRUSTRATION OF PURPOSE DOCTRINE

20. Plaintiff's moving affidavit establishes that the Plaintiff has been precluded from operating its business at the subject premises by virtue of the Governor's Executive Order 202.6.

21. The reason for the mandated shutdown is to quell a deadly virus.

22. To prevail, under the common law doctrine of frustration of purpose, the "frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense [cite omitted]". *Central for Specialty Care, Inc. v. CSC Acquisition I, LLC 185 AD3d 34 (1st Dept. 2020).*

23. By way of example, the doctrine of frustration of purpose has been invoked where a restaurant was unable to use the premises for three (3) years while a public sewer was being completed. *Benderson Develop. Co. Inc. v. Commenco Corp. 44 AD2d 889 (4th Dept. 1974) affd. 37 NY2d 728 (1975).* See also, *Jack Kelly Partners LLC v. Zegelstein 140 AD3d 79 affd. 28 NY3d 1103 (2016).*

24. Likewise, where a saloon could not operate during prohibition, it was relieved of the obligation to pay rent. *Doherty v. Eckstein Brewing Co. 198 AD 708 (1st Dept. 1921)*

25. Moreover, it is well established that "where performance becomes impossible because of action taken by government, performance is excused [cite omitted]". *Metpath Inc. v. Birmingham Fire Ins. Co. of Pennsylvania 86 AD2d 407, 411 (1st Dept. 1982).*

26. Here, Article 41 of the Lease obligates the Plaintiff to operate "solely as and for a fitness center/boutique boxing gym and for no other use or purpose. . . ."

27. Plaintiff's fitness center has been and remains closed by virtue of a governmental decree.

28. This is an unforeseen cataclysmic event that was not contemplated by anyone thereby frustrating the very purpose of the Lease.

NO UNCLEAN HANDS

29. The Defendant also suggests that the Plaintiff is somehow not entitled to "Yellowstone" relief based upon a hodgepodge of alleged additional leasehold defaults that were not included in the Notice to Cure.

30. The doctrine of unclean hands requires a showing that the accused party is "guilty of immoral conduct or unconscionable conduct directly related to the subject matter [cite omitted]." *Citibank, N.A. v. American Banana Co. 50 AD3d 593, 594 (1st Dept. 2008).*

31. None of the alleged leasehold defaults are directly related to this action.

32. By way of example, the Defendant alleges that noise emanates from the premises thereby creating a nuisance.

33. This was not included in the Notice to Cure.

34. Perhaps most importantly, the Plaintiff has been forced to closed due to the pandemic and as such there cannot be any noise complaints since March, 2020. The Landlord has also not submitted any professional sound/decibel readings empirically demonstrating a violation of the noise code or documented noise complaints while the Tenant was open as required by the lease. This is, yet another, impermissible attempt to grab the approximate $3,000,000.00 buildout for free. Indeed, as set forth in the accompanying affidavit, before the Tenant, there was a Mexican sports bar with approximately 20 big screen televisions with patrons watching sports all throughout the night and early morning and screaming when goals were scored. In contract, this Tenant closes at 10:00 p.m. during the week and 6:00 p.m. on weekends when it is open.

35. Moreover, it would be precipitous to deny a "Yellowstone" injunction based upon an allegation of unclean hands (forging managing agent's signature). *See, ERS Enterprises, Inc. v. Empire Holdings, LLC 286 AD2d 206 (1st Dept. 2001).*

NO UNDERTAKING

36. CPLR §6313 (c) and established case law make clear that the conditioning of a Yellowstone injunction upon the posting of an undertaking is purely discretionary and may be nominal. *37th St. Enterprises, Inc. v. 500-512 Seventh Ave. Assoc. 266 AD2d 28 (1st Dept. 1999).*

37. An undertaking is also not required, where, as here, the Tenant has made significant improvements to the premises totaling approximately $3,000,000.00. *WPA/Partners LLC v. Port Imperial Ferry 307 AD2d 234 (1st Dept. 2003).*

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

Dated: New York, New York
October 13, 2020

Fred L. Seeman