

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
INDEX NO.:

GRAPHNET, INC.

Plaintiff,

- against -

30 BROAD STREET VENTURE LLC

Defendant.

PLAINTIFF'S MEMORANDUM OF LAW

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PRELIMINARY STATEMENT

Plaintiff tenant, Graphnet, Inc. (“Plaintiff”), submits this memorandum of law in support of its application for a Yellowstone preliminary injunction, as well as a temporary restraining order tolling the running of the cure period in defendant’s notice to cure, and for such other relief, to preserve the status quo of its commercial lease (the “Lease”) made with the defendant herein as landlord, 30 Broad Street Venture LLC (“Defendant”).

STATEMENT OF FACTS

In order to avoid unnecessary repetition of the underlying facts, this Court is respectfully referred to the accompanying affidavit of Guy Conte, an officer of the Plaintiff (“Conte”). However, a short recitation of the facts will be provided herein.

The Defendant issued a Notice to Cure (the “Cure” or “Notice”) against Plaintiff, dated February 4, 2021, alleging that Plaintiff is in default under its Lease because it has allegedly failed to make payment of rent for the month of February 2021 and because the space that it leased from Defendant has allegedly become “. . . vacant, deserted, or abandoned . . .” The Notice provides a cure date of February 18, 2021, failing which cure the Defendant shall serve a notice of termination, terminating the Plaintiff’s Lease. It should be noted that the Lease was drafted by the Defendant’s attorneys.

The critical term defined in the Lease is the “Commencement Date,” which is the first date on which rent is due and owing. The “Commencement Date” is defined as:

“ . . . the later of (a) the date on which Landlord’s Work (as defined below and in Exhibit “B” hereto) in the Premises is Substantially Completed (as defined in Exhibit “B” hereto), (b) the date on which Landlord’s Work

in the Premises would have been Substantially Completed but for the occurrence of any Tenant Delay Days (as defined in Exhibit "B" hereto), or (c) the date on which Tenant occupies any portion of the Premises and begins conducting business therein." (Emphasis Added)

The Lease thereupon provides that the payment of rent shall begin on the "Commencement Date." (See Exhibit B, Article 1(C). That is, the occurrence of the Commencement Date triggers the payment of rent, and that event cannot occur unless pursuant to the precise and unmistakable language of the Lease, the Plaintiff, tenant, "occupies any portion of the Premises and begins conducting business therein."

Consequently, the Plaintiff has not breached its Lease because the Commencement Date could not have occurred without Plaintiff's having occupied any portion of the Premises and begun conducting business therein. The Cure is thus falsely charging Plaintiff with a breach of Lease and improperly threatening it with a Lease termination.

POINT I

**PLAINTIFF IS ENTITLED TO A YELLOWSTONE
INJUNCTION TO PRESERVE THE STATUS QUO
DURING THE PENDENCY OF PLAINTIFF'S
CHALLENGE TO DEFENDANT'S NOTICE**

The Court should issue a Yellowstone injunction so that Plaintiff may challenge Defendant before the Cure expires by its own terms.

The standard for the grant of a Yellowstone injunction is different from the grant of a preliminary injunction relief. See, Lexington Avenue at 42nd Street Corp. 205 A.D.2d at 423; See also Golub Corporation, 188 A.D.2d at 730. Demonstration of the likelihood of success on the merits, irreparable injury, balancing of the equities is not required. Garland, 147 A.D.2d at 307, 543 N.Y.S.2d at 59; Stuart v. D & D Associates, 168 A.D.2d 547, 548, 554, N.Y.S.2d 197, 198 (1st Dept. 1990). Rather a tenant is entitled to a Yellowstone injunction where it is demonstrated that:

1. It holds a commercial lease;
2. It has received a notice of default or concrete threat of termination of the lease from the landlord;
3. The application for the Yellowstone relief was made and granted prior to the termination of the lease; and
4. Tenant has the ability to cure the alleged default by any means short of vacating the premises.

Indeed, the mere threat of termination and forfeiture of the lease has been held sufficient to justify the Yellowstone injunction (see, Golub Corporation v. 423 Northeastern Industrial

Park, Inc., 188 A.D.2d 729, 730 (3rd Dept. 1992) citing; Post v. 120 E. N. Ave. Corp., 62 N.Y.2d 19, 26.

As provided in the accompanying affidavit, Plaintiff meets all four written criteria: it holds a commercial lease, has received an alleged notice, the application has been made prior to the termination of the lease (on February 25, 2021), and it has the desire and ability to cure the alleged defaults if this Court holds it is Plaintiff's obligation under the Lease to do so. Plaintiff has also been threatened with termination of its tenancy. See, First National Stores, Inc. v. Yellowstone Shopping Center, Inc., 21 N.Y.2d 630, 290 N.Y.S. 2d 721 (1968).

Thus, Plaintiff has satisfied the elements necessary for the granting of Yellowstone relief.

The fundamental purpose of a preliminary injunction, such as a Yellowstone preliminary injunction, is to preserve the status quo pending the ultimate determination of the merits of the action. Hoppman v. Riverview Equities Corp., 16 A.D.2d 631, 226 N.Y.S.2d 805 (1st Dep't 1962). Thus, any conduct or threatened conduct by the Defendant which may impair the ability of the Court to render the appropriate final judgment should be enjoined during the pendency of the action. Mucci v. Eli Haddad Corp., 101 A.D.2d 724, 475 N.Y.S.2d 35, 36 (1st Dep't 1984).

The objectives of a preliminary injunction are embodied in CPLR §6301, which empowers the court to grant a temporary restraining order:

[W]here it appears that the Defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the Plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the Plaintiff has demanded and would be entitled to a judgment restraining the Defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the Plaintiff. A temporary restraining order may be granted pending a hearing or a preliminary

injunction where it appears that the immediate reparable injury, loss or damage will result unless the Defendant is restrained before the hearing can be had.

A preliminary injunction is a provisional remedy. In Margolies v. Encountering Inc., 42 N.Y.2d 475 (1975), the court therein stated:

“A preliminary injunction may be granted in an action where it appears that the Defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the Plaintiff’s right respecting the subject of the action and tending to render the judgment ineffectual, or in any action where the Plaintiff has demanded and would be entitled to a judgment restraining the Defendant from the commission or the continuance of an act which, if committed or continued during the pendency of the action would produce injury to Plaintiff.”

The purpose of the remedy is to maintain the status quo. See, Nassau Roofing and Sheet Metal Co., Inc. v. Facilities Development Corp., 70 A.D.2d 1021 (2d Dept., 1979); Gambor Enterprises Inc. v. Kellys Services 69 A.D.2d 297 (4th Dept. 1979) and it is not for the Court to determine the underlying merits of the action which is a question reserved for trial. Tucker v. Toia 54 A.D.2d 322 (4th Dept. 1976).

In the instant case, it is imperative that the status quo is preserved by preliminarily enjoining Defendant from, inter alia, terminating the Lease or seeking to evict Plaintiff while Plaintiff seeks a determination of its rights.

POINT II

**AS THE CONDITION PRECEDENT OF THE OCCURRENCE
OF THE COMMENCEMENT DATE NEVER TOOK PLACE,
PLAINTIFF HAD NO DUTY TO COMMENCE PAYING RENT**

It is axiomatic that “when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms.” W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y. 2d 157, 566 N.E. 2d 639, 565 N.Y.S. 2d 540 [1990]. Where the language of a contract is unambiguous, the parties intent is determined within the four corners of the contract. See, IDT Corp. v. Tyco Group, S.A.R.L. 13 N.Y. 3d 209, 918 N.E. 2d 913, 890 N.Y.S. 2d 401 [2009]. See, also, Lighthouse 925 Hempstead, LLC v. Sprint Spectrum, L.P., 2012 N.Y. Misc. LEXIS 1926.

The language of the Lease, drafted by Defendant and its attorneys, is clear and unambiguous. The Commencement Date shall occur only on the later of Defendant's completion of its work or the date on which Plaintiff occupies any portion of the Premises. Ergo, even if Defendant completed the work for which it was responsible under the Lease, the Commencement Date would not be triggered unless and until Plaintiff took occupancy of any portion of the Premises; that is, the later of the two occurrences.

The Conte affidavit makes perfectly clear that Plaintiff cannot take possession of the Premises and conduct business therein because of the dangers imposed by the continuous Covid-19 pandemic. We respectfully submit that the plain language of the Lease is dispositive of this action.

In Lighthouse 925 Hempstead, infra, the lease into which the defendant entered with its landlord defined the Rent Commencement Date as:

“the earliest to occur of the following: (a) the first day of the month that is 60 days after the issuance of the Sprint Building Permit, or (b) the first day of the month that is 60 days after the date Sprint commences construction of the Facilities at the site. Starting on the Rent Commencement Date and on the first day of every month thereafter, Sprint will pay rent”

Thus, if Sprint failed to secure its building permit, the Rent Commencement Date would never occur. “It is undisputed that a Sprint Building Permit was never issued at any time. Hence, the Rent Commencement Date never occurred. As the condition precedent of the occurrence of the Rent Commencement Date never took place, Sprint had no duty to commence payment of monthly rent.” See, Lighthouse 925 Hempstead, *infra*.

The Plaintiff is not guilty of breaching any portion or provision of its Lease. The demanded Cure is thus improper and invalid and without legal effect. Nonetheless, the Plaintiff seeks a declaratory judgment on this point and a Yellowstone injunction that will stay the Defendant from terminating the Plaintiff’s Lease and attempting to recover possession of its very valuable leasehold space.

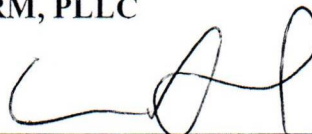
CONCLUSION

For the foregoing reasons, this Court should grant a Yellowstone preliminary injunction tolling and staying the running of the cure period in the Notice, declaring the Notice to be defective and a nullity and preliminarily enjoining the Defendant from serving any further notices or commencing summary or other proceedings or action to terminate the Lease based upon the defaults alleged in the Notice, and for such other and further relief as may be deemed just and proper.

Dated: New York, New York
February 18, 2021

Respectfully submitted,

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