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As of: Dec 05, 2012

WPA/Partners LLC, Appellant, v. Port Imperial Ferry Corp. et al., Defendants, and City of New York et al., Respondents.

1286N

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

307 A.D.2d 234*; *763 N.Y.S.2d 266*; *2003 N.Y. App. Div. LEXIS 8544

July 31, 2003, Decided
July 31, 2003, Entered

SUBSEQUENT HISTORY: [*1]**
Later proceeding at *WPA/Partners, LLC v. Port Imperial Ferry Corp., 2003 N.Y. App. Div. LEXIS 12667 (N.Y. App. Div. 1st Dep't, Nov. 20, 2003)*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff, a tenant, sued defendants, a city and other, for a declaratory judgment, reformation of contract, and damages arising from breach of contract and partial eviction. The Supreme Court, New York County (New York), denied the tenant's motion for a Yellowstone injunction challenging a notice of default served by the city. The tenant appealed the order.

OVERVIEW: The tenant held a lease from the city for a historic pier. The tenant expended substantial sums in obtaining permits and making improvement to the property. Following the September 11, 2001, terrorist attacks, the city, without court order, seized the premises and thereafter excluded the tenant from possession. Moreover, the city allowed a port authority to construct a ferry terminal on the pier that the tenant had reconstructed and also allowed other vendors and commercial establishments to operate on the premises. After the tenant filed an action to recover damages for wrongful eviction, the city filed an action for non-payment of rent. Although the action was dismissed, the city served a notice of default on the tenant. In the motion for a Yellowstone injunction, the tenant argued that the default notice was an impermissible end-run around the tenant's pending action. The appellate court held that there was a sufficient showing, especially in view of the tenant's significant investment in a valuable leasehold, that the trial court's denial of injunctive relief was an improvident exercise of discretion.

OUTCOME: The order was reversed, on the law, the facts, and in the exercise of discretion, without costs, the motion was granted, and the matter was remanded for further proceedings.

CORE TERMS: rent, cure, default, lease, pier, tenant, injunction, renovation, visitors', declaratory judgment,

breach of contract, forfeiture, inter alia, presently, leasehold, vacating, partial, declare, notice, exercise of discretion, nonpayment, emergency, ferry

LexisNexis(R) Headnotes

Civil Procedure > Remedies > Injunctions > Elements > General Overview
Real Property Law > Landlord & Tenant > Lease Agreements > Commercial Leases > General Overview
[HN1] A Yellowstone injunction maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture. The party seeking Yellowstone relief must demonstrate that it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises. The law in this regard disfavors forfeiture, and a demonstration of success on the merits is not a prerequisite to such relief. Moreover, the tenant need not at this juncture prove its ability to cure. Rather, 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.

Contracts Law > Breach > Causes of Action > General Overview
[HN2] In New York, one who frustrates another's performance may not hold the frustrated party in breach of contract.

COUNSEL: For Plaintiff-Appellant: John H. Reichman.

For Defendants-Respondents: Scott Shorr.

JUDGES: Concur--Tom, J.P., Mazzarelli, Andrias, Friedman, Marlow, JJ.

OPINION

[*234] [267]** Order, Supreme Court, New York County (Faviola Soto, J.), entered October 15, 2002, which denied plaintiff-appellant's motion for a *Yellowstone* injunction, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, the motion granted, and the matter remanded for further proceedings.

The underlying consolidated action is for, inter alia, a declaratory judgment, reformation of contract, and damages from breach of contract and partial eviction. Plaintiff is a tenant, and the City is the landlord, of historic Pier A and adjacent underwater lands in the Battery Park vicinity of lower Manhattan. The 49-year lease was executed in 1997 pursuant to the City's plan of converting the area into a commercial attraction offering several commercial services, as well as renovation of a visitors' center within a three-story landmark Victorian building located on the pier. Under a sublease from **[***2]** plaintiff, the New York City Parks Department would operate the visitors' center at a token rent, in exchange for New York City paying a portion of the costs of renovating the building. By May of 2002, plaintiff had expended in excess of $ 22 million to obtain the necessary permits, replace substantial portions of the pier's structure, rebuild the granite breakwater, and to conduct additional renovation, with the result that by that time, approximately 70% of the project had been completed. Additionally, plaintiff was obligated to pay annual rent, ultimately $ 440,000 per annum, after an initial period of reduced rent. The lease authorized an abatement of rent, under **[*235]** appropriate circumstances, during an initial period of "Unavoidable Delays" should governmental authorities fail to timely grant discretionary approvals.

Plaintiff claimed the City obtained funding from the State to pay a portion of its share of the visitors' center renovation and agreed to compensate plaintiff by amending the lease. The parties dispute the validity of the amendment to the lease, negotiated by defendant New York City Economic Development Corporation but unsigned by Deputy Mayor Mastro, whereby the City **[***3]** purportedly reduced the rent as a consequence of its dilatory conduct regarding its obligation to partially finance the visitors' center renovation. Thereafter, the City sent rental bills that appeared to incorporate a reduction in the amount of rent under the amendment, and accepted payment in such amount. The rent, and delays, and the validity of the amendment are all in dispute in the underlying action, matters which are not presently before us. The City, in June 2000, billed plaintiff retroactively for the additional rent amounts that plaintiff contends were abated in the amendment, though the City waited until May 2001 to declare the amendment

ineffective.

In August 2001, plaintiff commenced a *CPLR article 78* proceeding to either compel the City to sign the amendment or to declare the amendment effective notwithstanding the absence of the City's signature, with an adjudication of the rent due.

In the immediate aftermath of the events of September 11, 2001, plaintiff allowed the City's Emergency Medical Service to use the pier to treat victims and to accommodate evacuation. However, on September 26, 2001, the City, without court order, seized the premises and thereafter excluded **[***4]** plaintiff from possession. **[**268]** Moreover, the City allowed defendant Port Authority to construct a ferry terminal on the pier which plaintiff had reconstructed, and also allowed other vendors and commercial establishments to operate on the premises. Since November 2001, defendant New York Waterway has been conducting ferry service from that pier. In January 2002, plaintiff commenced a damages action for $ 30 million relating to its having been allegedly wrongfully evicted and for breach of contract, and to recover possession. In its answer, the City maintained that its actions were authorized as emergency measures under the lease.

Meanwhile, in or about October 2001, the City commenced a Civil Court nonpayment proceeding, but, having served plaintiff at the very location from which the City had ousted **[*236]** plaintiff, the proceeding was ultimately dismissed. Civil Court also indicated that insofar as the City was already in possession of the premises, it would have to commence a plenary proceeding to recover rent. The order dismissing the nonpayment proceeding was dated June 26, 2002. On July 19, 2002, the City served plaintiff with a notice of default, providing for a cure period ending August 2, 2002.

[*5]** Plaintiff moved for a *Yellowstone* injunction (*First Natl. Stores v Yellowstone Shopping Ctr., 21 N.Y.2d 630, 237 N.E.2d 868, 290 N.Y.S.2d 721 [1968]*), arguing, inter alia, that the default notice was an impermissible end run around plaintiff's pending declaratory judgment action, as well as an attempt to circumvent discovery in that regard. Plaintiff submitted an affidavit that "it wants and will be able to cure," which the City argues as being merely conclusory and devoid of a showing that it has the funds to cure the default. The City also disputed the effectiveness of the lease amendment on technical grounds, and specifically objected to plaintiff's contention that the City's billing changes after the amendment reflected its acknowledgment of the amendment and hence constituted partial performance thereof. Plaintiff, though, maintains, inter alia, that insofar as the default was improperly taken, it can cure by prevailing on the merits in this action, so that whether or not it can monetarily cure the purported default is besides the point. Several other contentions are made by both sides that form the gravamen of the underlying actions and are not properly before **[***6]** us. This recitation is made only in connection with our evaluation whether, under these circumstances, a *Yellowstone* injunction is warranted.

We conclude that on this record there is a sufficient showing, especially in view of plaintiff's significant investment in a valuable leasehold, that the motion court's denial of injunctive relief was an improvident exercise of discretion.

[HN1] A *Yellowstone* injunction "maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture" (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Avenue Associates, 93 N.Y.2d 508, 514, 715 N.E.2d 117, 693 N.Y.S.2d 91 [1999]*). The party seeking *Yellowstone* relief must demonstrate that "it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises" (*cf. Zona v SoHo Centrale, L.L.C., 270 A.D.2d 12, 13, 704 N.Y.S.2d 38 [2000]*, quoting *Graubard Mollen Horowitz Pomeranz & Shapiro, supra at 514* [internal **[*237]** quotation marks omitted]). **[***7]** We have long recognized that the law in this regard disfavors forfeiture, and a demonstration of success on the merits is **[**269]** not a prerequisite to such relief (*Herzfeld & Stern v Ironwood Realty Corp., 102 A.D.2d 737, 738, 477 N.Y.S.2d 7 [1984]* and citations within). Moreover, the tenant need not at this juncture prove its ability to cure; rather, "[t]he 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" *Herzfeld & Stern, supra at 738*; *accord Jemaltown of 125th Street v Leon Betesh/Park Seen Realty Associates, 115 A.D.2d 381, 382, 496 N.Y.S.2d 16 [1985]*). This record persuades us that plaintiff has the motivation and

the plausible means of curing the "default" by virtue of its preexisting declaratory judgment action, though we caution that the outcome of that proceeding is, of course, presently uncertain. Nevertheless, we have recently noted the general proposition that [HN2] one who frustrates another's performance may not hold the frustrated party in breach of contract (*Stardial Communications Corp. v Turner Construction Co., 305 A.D.2d 126, 757 N.Y.S.2d 749 [2003]*). **[***8]** Moreover, in view of plaintiff's extensive expenditures thus far, the drastic forfeiture of this long-term lease would impermissibly allow the City to reap a windfall under circumstances still being litigated and, furthermore, would essentially subvert plaintiff's previously commenced actions by deciding the City's latter-commenced holdover proceeding on basically the same issues as those raised by plaintiff. Finally, in view of the considerable value already invested by plaintiff in improvements on the property, we dispense with the requirement of a bond (*John A. Reisenbach Charter School v Wolfson, 298 A.D.2d 224, 748 N.Y.S.2d 247 [2002]*; *Kuo Po Trading Co. v Tsung Tsin Assn., 273 A.D.2d 111, 709 N.Y.S.2d 89 [2000]*).

Concur--Tom, J.P., Mazzarelli, Andrias, Friedman and Marlow, JJ.