

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

METERED APPLIANCES, INC.,
Plaintiff,

INDEX NO. 158630/12

-against-

MOTION SEQ. NO. 001

SUGAREE REALTY, LLC and J & M REALTY SERVICES CORP.
Defendants.

The following papers were read on this application by petitioner for a Yellowstone Injunction.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

On December 6, 2012, Metered Appliances, Inc. (petitioner) brought an application by Order to Show Cause (OSC) for a Yellowstone injunction against Sugaree Realty, LLC (Sugaree) and J & M Realty Services Corp. (J & M) (collectively, defendants) seeking an order: (1) staying and tolling, pending the final determination of this matter, the running of any period to cure any alleged default under the lease for the laundry room at 341 St. Nicholas Avenue, New York, NY (the premises) entered into by plaintiff and Jerry Edelman, managing member of Sugaree, the owner of the premises, as claimed by the Landlord in its Five Day Notice dated November 15, 2012; (2) preventing the termination and cancellation of the lease; (3) directing that defendants reinstall plaintiff's laundry equipment in the laundry room which defendants allegedly disconnected and removed from the Laundry Room in or about September 2012; and (4) enjoining defendants from taking any steps to prevent plaintiff access to the premises for the purposes of operating, maintaining and servicing its laundry equipment in the laundry room

at the subject premises (motion sequence 001). On December 7, 2012, plaintiff sought a temporary restraining order (TRO) and preliminary injunction enjoining defendants from revoking, nullifying, canceling or termination the lease based upon a Notice of Termination, dated November 15, 2012 pending the final determination of this action. This Court granted plaintiff's application for a TRO pending a hearing on the preliminary injunction which, *inter alia*, enjoined defendants from: (i) revoking, nullifying, cancelling, or terminating the Lease based upon the Notice of Termination dated November 15, 2012; (ii) taking any steps to evict plaintiff from the laundry room or the premises based upon the Notice of Termination; (iii) permitting any other person or entity access to the premises for purposes of utilizing the laundry room for the operation of laundry equipment; (iv) installing their own laundry equipment in the laundry room at the premises; and (v) taking any steps to prevent access to plaintiff to the premises for the purposes of operating, maintaining and servicing its laundry equipment in the laundry room. However, the Court did not grant the portion of the TRO application wherein plaintiff sought a directive to have defendants reinstall plaintiff's laundry equipment.

Subsequently, on January 25, 2013, plaintiff brought a motion by OSC for contempt alleging that the defendants had in effect terminated the lease by refusing and/or locking the doors to the premises denying plaintiff access to the laundry room, that defendants concede that they have already exercised self help and removed plaintiff's laundry equipment from the premises, in violation of terms of the TRO. On February 1, 2013, defendants filed an answer with counterclaims. Defendants proffer that prior to the issuance of the TRO, plaintiff's laundry machines were disconnected and placed in the basement on October 1, 2012, and they replaced the laundry machines with their own. Additionally, defendants proffer that access to the basement was never denied to plaintiff. Furthermore, defendants state that they had a unilateral right to remove and disconnect the laundry machines, pursuant to paragraph 15 of the agreement because plaintiffs breach the agreement by never paying the monthly cost of

water and electric to run the machines.

On February 6, 2013, oral argument was held on plaintiff's applications for a preliminary injunction and for contempt. At oral argument the Court also extended the TRO in this matter until the herein motions are decided.

DISCUSSION

"A *Yellowstone* injunction is a provisional remedy, and the purpose of the interlocutory relief is not to determine the ultimate rights of the parties but to maintain the status quo until a full hearing on the merits can be held" (2914 *Third Sportswear Realty Corp. v Acadia 2914 Third Ave., LLC*, 93 AD3d 573, 573 [1st Dept 2012], citing *Gambar Enters. v Kelly Servs.*, 69 AD2d 297, 306 [1979]). In order to obtain a *Yellowstone* Injunction, the moving party must demonstrate that "(1) it holds a commercial lease; (2) it received from the landlord 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 & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]; see *Aegis Holding Lipstick LLC v Metropolitan 885 Third Ave. Leasehold LLC*, 95 AD3d 708, 708 [1st Dept 2012]). The limited purpose of a *Yellowstone* injunction is to stay the landlord's termination of the lease while the underlying default is litigated (*id.*).

In this case plaintiff has not demonstrated its right to *Yellowstone* relief, as plaintiff failed to bring this proceeding before the expiration of the 5 day cure period of the Notice of Termination, which was served on November 15, 2012. The Court finds that the defendants' engaged in "self-help" by removing and replacing plaintiff's laundry machines with their own, and as such this matter is set down for an evidentiary hearing on contempt and possible damages, as to whether defendants violated the TRO.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that plaintiff's motion for a preliminary injunction, is denied in its entirety; and
it is further,

ORDERED that plaintiff is directed to serve a copy of this Order with Notice of Entry
upon the defendants within 30 days, and the Clerk shall enter the case accordingly.

This constitutes the Decision and Order of the Court.

Dated: 12/17/13


PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE