



Aqua Duck Flea Mkt. LLC v 612 Wortman Ave., LLC

2022 NY Slip Op 33209(U) (2022) | Cited 0 times | New York Supreme Court | September 19, 2022

SUPREME COURT OF 8 -----k LLC,

against

612

-----xi Inde~

2022

has moved Yellowstone

The cross-'-moved lease. motions have

submitted reviewing all

On parties are amended

leases

Avenuei

County. as

10, worn patches and are uneven drainage

injunction

currently readily defendant cross.-moved seeking to terminate grounds the

curriculum details. FILED: KINGS COUNTY CLERK 09/22/2022 12:43 PM INDEX NO. 522161/2019
NYSCEF DOC. NO. 111 RECEIVED NYSCEF: 09/22/2022

1 of 4 THE STATE OF NEW YORK COUNTY OF KINGS: CIVIL TERM: COMMERCIAL ---



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----- AQUA DUCK FLEA MARKET

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WORTMAN AVENUE, LLC, Plaintiff,

Defendant, - ----- - PRESENT: HON. LEON RUCHELSMAN Decision
and order

No. 522161/2019

September 19,

The plaintiff seeking a injunction.

defendant has seeking the right to terminate the The been opposed respectively. Papers were_

by the parties and arguments held. After

the arguments, this court now makes the following determination.

June 12, 2013 the entered into lease

and numerous amended thereafter for space located near

Morita Avenue, Cozine Fountain Avenue and Wortman Avenue

in Kings The space is used a pedestrian flea market.

A notice to cure was served on May 20.19 alleging defaults relating to Cracks, system.

The plaintiff has moved seeking a Yellowstone arguing

either the noted de-faults are baseless or that in any event they be. cured. The has the le.ase on the
plaintiff does not seek to

the

[* 1] Law is whereby may

a cure "so upon an



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on the cure forfeiture" (.Graubard Mollen

Ave. Assocs.I 613 [1999],

v. Center

630, other demonstrate

"it

alleged default the premises"

seeking a tnat:

cormii.ercial

a (3) for

e:x:piration the

termination of leaseI and ability to of

vacating (TM, Xioti:s Corp., v. Go 50 855 NYS2d 578 2d

Article of lease. states that tenant "shall, a:t

cost .and gooc;i of Premises

ti.ding; without itni tat curbing, .a:nd

2 FILED: KINGS COUNTY CLERK 09/22/2022 12:43 PM INDEX NO. 522161/2019 NYSCEF DOC.
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2 of 4 Conclusions of

A Yellowstone injunction a remedy a tenant

obtain stay tolling the period that adverse

determination the merits tenant may :the default and . . avoid a Horowitz Pomeranz & Shapiro



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v. 600 Third 93 NY2d 508, NYS2d 91

First National Stores Yellowstone Shopping Inc., 21

NY2d 290 NYS2d 721 [1968]). For a Yellowstone injunction to be granted the Plaintiff, among things, must

that is prepared and maintains the ability to cure the

by any means short of vacating . . (Graubard, supra) .

Thus, a tenant Yellowstone must demonstrate

(1) it holds a lease, .(2) it has received from the

landlord notice of default, its application a temporary

restraining order was made prior to of cure· period

and the (4) it has the desire and cure the alleged default by any means short

the premises Restaurant LSS Leasing Ltd. Liability .. , AD3d 678, [Dept., 2008]).

7. oi the the

its sole. expense, take care the

incl 1 ion, paving and. shal 1 keep

----- . [* 2] the asserts which and

lot and

over one

repairs

continue

repaving the is what pursuant t6



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lease.

cure Inc., v.

AD2d 589 NYS2d 570 [2d 1992]),

alleg-ed of

the lease.

~xpert

DiProperzio who

in disrepair would require the total

[si-c] use of the aB flea market since .and

has

good artd

{see, of Anthony DiProperzio, page Thus,

trc3.ry expert reip9rt d).: th.e one tt:ed by the or .isolated statements DiProperzio' s

the defendant argues demonstrc:rtes a consensus regarding the
FILED: KINGS COUNTY CLERK
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3 of 4 same in good order and condition" (id). The defendant

the only way in the tenant can cure the defects

restore the is to completely repave regrade the lot and

that such improvements would cost million dollars. The

plaintiff asserts that it has made all the necessary and

will to make repairs as they become necessary, however,



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entire lot beyond is required

the Thus, contrary to the arguments of the defendant, the plaintiff does not assert that it unequivocally is unwilling to

any defaults (Metropolis Westchester Lanes Colonial

Park Homes Inc., 187 492, Dept.,

but rather the default requiring a complete repaving

the lot is not a default under

The plaintiff submitted an affidavit of Anthony

concluded that "the subject property is not

a state of which demolition

of the asphalt surfaces and replacement with new due to the the property by Tenant a 2013

that thE= Tenant performed reasonable repairs in order to

maintain the property in reasonable order condition"

Expert Report 1) . a

con that sput es subrni plaintiff within Mr. report

that

3

[* 3] total of lot of. require inquiry and

this tenant; language

the repairs{

paved cost of over one repair very new, There



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damaged is repair

of

the a

2022 Hoh. JSC

4. FILED: KINGS COUNTY CLERK 09/22/2022 12:43 PM INDEX NO. 522161/2019 NYSCEF DOC. NO. 111 RECEIVED NYSCEF: 09/22/2022

4 of 4 need for a repaving the are really questions fact

that further discovery. However, those

considerations do not affect the injunction to which the

plaintiff is entitled. Furthermore, it cannot be concluded at

junction that the based upon in the lease

requiring tenant to make all must provide a brand

new lot at a million dollars. A by its terms cannot mean something can be questions

of fact whether something so that beyond must

be replaced as new, however, those questions, as noted, do not

demand a denial the Yellowstone injunction.

Therefore, based on the foregoing motion seeking Yellowstone injunction is granted. The cross-motion is

consequently denied.

so ordered.

ENTER:

DATED: September 19, Brooklyn N.Y. Leon Ruchelsman



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[* 4]

