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Rose Grp. Park Ave. LLC v. Third Church Christ, Scientist of NYC

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**Rose Group Park Ave. LLC v Third Church Christ,
Scientist, of N.Y. City**

2020 NY Slip Op 33308(U)

October 7, 2020

Supreme Court, New York County

Docket Number: 651390/2019

Judge: Jennifer G. Schechter

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JENNIFER G. SCHECTER PART IAS MOTION 54EFM

Justice

-----X

INDEX NO. 651390/2019

ROSE GROUP PARK AVENUE LLC,

MOTION SEQ. NO. 004 005 006

Plaintiff,

- v -

THIRD CHURCH CHRIST, SCIENTIST, OF NEW YORK
CITY,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 144, 145, 146, 147, 148, 149, 150, 151, 152, 153

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Motion sequence numbers 004, 005 and 006 are consolidated for disposition. Plaintiff Rose Group Park Avenue LLC (Tenant) moves, by order to show cause, for Yellowstone injunctions in connection with the most recent notices to cure: the 30-Day Notice to Cure and 10-Day Notice to Cure dated July 2, 2020 (004), a notice to cure dated July 16, 2020 (005), and the 30-Day Notice to Cure dated September 4, 2020 (006) (collectively the 2020 Notices). Tenant also moves for a preliminary injunction enjoining defendant from serving additional notices to cure without court

approval, and for leave to file an amended complaint pursuant to CPLR 3025. Defendant Third Church Christ, Scientist, of New York City (Landlord) opposes the motions.

“*Yellowstone* relief is available to protect against leasehold forfeiture, provided that the tenant has the ability to cure by means short of vacatur in the event the tenant is found to be in default of its obligations under a lease” (*Village Ctr. for Care v Sligo Realty and Serv. Corp.*, 95 AD3d 219, 222 [1st Dept 2012]). The relief “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 Ave. Assoc.*, 93 NY2d 508, 514 [1999]). “[T]o obtain a *Yellowstone* injunction, the moving party must demonstrate that: (1) it holds a commercial lease; (2) it received from the landlord either 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 (*225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421 [1st Dept 1995]).

Tenant, based on the parties’ performance under the lease for years, asserts good-faith disputes as to whether there are any breaches in the first instance. The lease does not unambiguously answer every specific question implicated by the numerous notices to cure that the Landlord served, some of which involve the parties’ respective obligations during a pandemic when Tenant’s events, if any, have necessarily been limited. Sadly, those issues and perhaps more will have to be resolved at a costly trial with both parties incurring costs. It is clear, however, that the parties have not fulfilled their court-ordered obligations (*see* Dkt. 142 at 3), and that a trial

sooner rather than later is essential so that the parties have clarity going forward for the many years that they will likely be co-existing in the same space. Discovery will be accelerated.

The *Yellowstone* injunction requested in Motion 004 is granted. The 30-Day Notice to Cure served on July 2, 2020 (Dkt. 119 [July 2 Notices] at 2-3) alleges Tenant failed to “maintain[] a custodial staff to clean the Premises . . . in accordance with the guidelines for cleaning houses of worship published by the New York State Department of Health,” and to “monitor and control entrances to the Premises” during Landlord’s religious services. The 10-Day Notice to Cure served on July 2, 2020 (*id.* at 5-7) alleges that Tenant failed to reimburse Landlord for purported repair expenses totaling \$6,847 and failed to pay insurance premiums totaling \$21,843.¹ Tenant disputes these alleged breaches. Tenant is entitled to a *Yellowstone* injunction regarding each of the alleged breaches in the July 2 Notices. Having been billed for the repairs and insurance premiums (and notified of the need for repairs in advance, although Tenant disputes whether such repairs were needed), Tenant is required to pay for them, along with base rent, as a condition of the *Yellowstone*.

The *Yellowstone* injunction requested in Motion 005 is likewise granted. The 10-Day Notice to Cure served on July 16, 2020 demanded Tenant pay \$109,162.90 in “Percentage Rent” for the quarter ending on June 30, 2020 (Dkt. 148 [July 16 Notice]). The demand was based upon Tenant’s alleged failure to operate its business for 60 days, triggering a provision of the lease that computes Percentage Rent based on average Gross Sales from previous years (Dkt. 121 [Lease] at 23). It is unclear whether Landlord will be able to establish that Tenant’s failure to host live events during a public health crisis when legal restrictions are in effect constitutes a failure “to operate [the] business at the Premises” during the quarter ending June 30, 2020.

¹ On July 8, 2020, Rose Group paid the base rent for July, obviating the default for failure to pay base rent, which was also mentioned in the 10-Day July 2, 2020 Notice to Cure.

The *Yellowstone* injunction requested in Motion 006 is likewise granted as there is a good-faith dispute as to whether there has been any default and Tenant has committed to curing any default if one exists (same as all of the other purported defaults).

Plaintiff's motion for leave to amend the complaint is granted. Landlord failed to demonstrate that the proposed pleading (Dkt. 211) is "palpably insufficient or patently devoid of merit," or that the delay in filing it "would cause prejudice or surprise" (*Lucido v Mancuso*, 49 AD3d 220, 229 [2d Dept 2008]). Landlord also has not shown that amendments are prejudicial, scandalous, and unnecessary pursuant to CPLR 3024(b). Accordingly, it is

ORDERED the motion of Rose Group Park Avenue LLC for a *Yellowstone* injunction in connection with the alleged breaches of their commercial lease described in the 2020 Notices and for leave to amend its complaint is granted to address these notices is granted; and it is further

ORDERED that Tenant is to separately e-file the amended complaint within five days and Landlord is to answer no more than 10 days thereafter; it is further

ORDERED that Landlord is enjoined from terminating the lease of Tenant and from commencing legal proceedings based on the defaults of the lease alleged in the 2020 Notices, and the time to cure those alleged defaults is tolled, pending adjudication of the merits on condition that (1) Tenant timely pay base rent on the first of each month per its lease during the pendency of the action, (2) Tenant pay Landlord the disputed amounts of \$6,847 for alleged repair expenses and alleged insurance premiums totaling \$21,843 to Landlord within 14 days of this decision and order without prejudice; (3) Tenant may not review security footage of Landlord's services unless there is a good-faith allegation of a crime or damage to a person or property taking place during those services and (4) Tenant may not in any way impede Landlord's access to closets where its materials are stored; it is further

ORDERED that Tenant is to separately e-file the amended complaint within five days and Landlord is to answer no more than 10 days thereafter; it is further

ORDERED that within one week of the e-filing of this order, the parties are to submit an agreed-upon accelerated discovery schedule with the deadline for all discovery being December 31, 2020 in contemplation of an early 2021 trial. The parties are to e-file a stipulation setting forth deadlines and are to email it to mrand@nycourts.gov in Word format; it is further

ORDERED that based on the amount, nature and frequency of the Landlord's notices to cure, Landlord may not serve any further notices to cure without leave of the court, which must be obtained by order to show cause; it is further

ORDERED that all other relief sought by Tenant is denied.

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10/7/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- DENIED
- NON-FINAL DISPOSITION
- GRANTED IN PART
- OTHER