SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------x Index No. 17762/2014

NY GREAT STONE INC.,

Plaintiff,

- against -

TWO FULTON SQUARE LLC,

Defendant.

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AFFIRMATION IN OPPOSITION TO PLAINTIFF'S MOTION FOR A *YELLOWSTONE* INJUNCTION

DAVID R. BRODY, an attorney duly admitted to practice before the courts of the state of New York, affirms the following to be true under the penalties for perjury:

1. I am a member of Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., the attorneys for defendant-landlord TWO FULTON SQUARE LLC ("defendant" or the "landlord"), and I am fully familiar with the facts and circumstances of this action, and the landlord's dispute with plaintiff-tenant NY GREAT STONE INC. ("plaintiff" or the "tenant"), as set forth herein.

2. This affirmation is submitted in opposition to plaintiff-tenant's motion for *Yellowstone* preliminary injunctive brought by order to show cause dated December 10, 2014 (the "OSC"), with regard to a notice to cure served by the landlord dated November 21, 2014 (the "NTC") (*see* the NTC, Exhibit "C" to the OSC).

3. Plaintiff seeks a *Yellowstone* injunction for a default that is incapable of being cured: its undisputed failure to timely obtain and furnish the landlord with insurance policies in the coverage amounts and for the periods required by the parties' lease agreement. Therefore, and for the reasons set forth below, this Court should deny plaintiff's motion.

PLAINTIFF IS NOT ENTITLED TO *YELLOWSTONE* INJUNCTIVE RELIEF BECAUSE IT COMMITTED AN INCURABLE DEFAULT

4. In order to obtain a *Yellowstone* injunction, a commercial tenant must demonstrate that: (a) it holds a commercial lease; (b) it received a notice of default or a threat

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(212) 431-1300

of termination of the lease from its landlord; (c) it requested injunctive relief prior to termination of the lease; and (d) **it is prepared and maintains the ability to cure the alleged default** by any means short of vacating the premises [emphasis added]. First National Stores v. Yellowstone Shopping Center, 21 NY2d 630 (1968); Graubard Mollen Horowetz Pomeranz & Shapiro v. 600 Third Avenue Associates, 93 NY2d 508, 514, 693 NYS2d 91, 94 (1999).

5. When a default is incapable of cure, *Yellowstone* relief is not available. JH Parking Corp. v. East 112th Realty Corp., 298 AD2d 258 (1st Dept. 2002) (a tenant incapable of curing default cannot establish entitlement to *Yellowstone* relief).

6. Here, Article 8 of the parties' lease dated March 10, 2011 (the "Lease") (*see* the Lease, Exhibit "A" to the OSC), provides, in relevant part, that:

> **Tenant's Liability Insurance Property Loss Damage, Indemnity:**
> **8.** ... Tenant agrees, at Tenant's sole cost and expense, to maintain general public liability insurance in standard form in favor Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises, effective from the date Tenant enters into possession and during the term of this lease. Such insurance shall be in an amount and with carriers acceptable to the Owner. Such policy or policies shall be delivered to the Owner. ... [Emphasis added]

7. Article 6 of the Rider to the Lease expressly provides that:

> LIABILITY INSURANCE: Tenant covenants and agrees to provide the Landlord within ten (10) days from the commencement date hereof and for the duration of the term of this lease with a comprehensive policy of general liability insurance in the amount of $1,000,000.00 for bodily injury and $300,000.00 for property damage naming the Landlord as additional insured.
> [Emphasis added]

8. As stated in the NTC (*see* Exhibit "C" to the OSC), the tenant violated and is in default of the Lease by virtue of its failure to obtain and deliver to the landlord copies of insurance policies of the types, in the coverage amounts and for the periods required by the Lease.

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9. Plaintiff does not deny that it failed to obtain and furnish landlord with copies of the requisite insurance policies, but claims that it cured its default by annexing a certificate of insurance as Exhibit "D" to the OSC.

10. However, the certificate of insurance does not evidence plaintiff's compliance with its Lease obligations because the Lease requires: (a) that the policy, not a certificate of insurance, be delivered to the landlord; and (b) that plaintiff maintain insurance coverage during the **entire** term of the Lease – March 15, 2011 to March 14, 2016 – but the certificate of insurance purportedly shows coverage in place only since April 7, 2014.

11. In the first place, a certificate of insurance is not an insurance policy, does not affect insurance coverage, does not contain an exhaustive recitation of all the terms and conditions of the actual insurance policy, and is not a vehicle by which the coverage offered by the underlying policy can be changed. A certificate of insurance is simply a summary of some of the terms and conditions of the policy.

12. Indeed, the certificate annexed to plaintiff's OSC expressly states in bold at the top of the form:

> **THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.**

13. The landlord, as the certificate holder, is thus afforded no assurance that the actual policy affords the necessary coverage or otherwise contains the proper endorsements.

14. In fact, the very next warning on the certificate annexed to plaintiff's OSC states in bold that:

> **IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).**

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NY, NY 10013-3993
(212) 431-1300

15. By failing to deliver the actual insurance policy(ies) to the landlord, plaintiff has thereby, perhaps intentionally, made it impossible to determine whether the requisite endorsements are therein contained.

16. Similarly, it is impossible to determine from the certificate whether the policy substantively affords the requisite coverage given that the certificate itself states that:

> THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

17. Given the foregoing, and given that the Lease requires that the insurance policy or policies be delivered to the Owner – not a certificate of insurance – plaintiff's annexing of the certificate of insurance to its OSC does not constitute a cure of its default.

18. In the second place, it is undisputed that the certificate of insurance, dated December 2, 2014, fails to evidence that plaintiff had any insurance – let alone the requisite coverage – in force for more than three years out of its five-year Lease.

19. The Lease expressly requires plaintiff to procure insurance coverage within ten (10) days from the commencement date thereof and for the duration of the term of the Lease, and that the coverage be in effect from the date plaintiff enters into possession and during the term of the Lease.

20. Plaintiff's failure to procure and maintain insurance – let alone the requisite types and amounts – for over three years is an incurable default. *See* Kyung Sik Kim v. Idylwood, N.Y., LLC, 66 AD3d 528, 886 NYS2d 337 (1st Dept. 2009) (affirming denial of motion for *Yellowstone* injunction; tenant's failure to maintain insurance coverage as required by the lease was an incurable default; failure to carry requisite insurance is a material breach of a lease which may not be cured by obtaining prospective insurance

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coverage). *See also* Kramer v. Bohensky, 27 Misc3d 1237(A), 2010 NY Slip Op 51089(U), 2010 WL 2505474 (Sup. Ct. Kings County 2010) (failure to provide insurance an incurable breach of the lease).

21. Therefore, it is respectfully submitted that plaintiff's certificate of insurance does not cure its Lease default, and that plaintiff's failure to have insurance coverage for three years is an incurable default.

IF THIS COURT GRANTS PLAINTIFF INJUNCTIVE RELIEF, PLAINTIFF SHOULD BE REQUIRED TO POST AN APPROPRIATE UNDERTAKING

22. Pursuant to CPLR 6312(b), any grant of preliminary injunctive relief must be accompanied by the posting of an appropriate undertaking sufficient to cover all damages which may sustained in the event it is ultimately determined that the movant was not entitled to such relief.

23. As the Court of Appeals has stated, in discussing the grant of preliminary injunctive relief:

> A preliminary injunction is an extraordinary provisional remedy to which a plaintiff is entitled only on a special showing. It operates as a substantial limitation to the Defendant's interests prior to any adjudication of the respective rights of the parties on the merits of the controversy between them. To afford reasonable protection to the Defendant against erroneous or improper grant of this special provisional remedy, the Plaintiff as beneficiary thereof is required to post an undertaking in an amount fixed by the Court. If it is later finally determined that the preliminary injunction was improperly granted there will then be a ready source from which the Defendant may recover for damages which he may have sustained.

Margolis v. Encounter, Inc., 42 NY2d 475, 479, 398 NYS2d 877, 880 (1977).

24. The purpose of the requirement of an undertaking, as a condition for the grant of a preliminary injunction, is to reimburse the defendant's damages if it is later determined that plaintiff was not entitled to the injunction. Margolies v. Encounter, Inc., *supra*. Thus, the amount of the required undertaking must reasonably relate to the actual damage which may be sustained by the defendant including legal fees, loss of use as well as fair market use

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377 BROADWAY
NY, NY 10013-3993
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and occupancy. *See* Weitzen v. 130 East 65th Street Sponsor Corp., 86 AD2d 511, 445 NYS2d 477 (1st Dept. 1982).

IF THIS COURT GRANTS PLAINTIFF INJUNCTIVE RELIEF, PLAINTIFF SHOULD BE DIRECTED TO PAY OUTSTANDING AND PROSPECTIVE RENT/USE AND OCCUPANCY, AND FURNISH DEFENDANT WITH THE REQUISITE INSURANCE POLICIES

25. In the event this Court grants plaintiff injunctive relief, plaintiff should be directed to pay outstanding and prospective rent/use and occupancy during the pendency of this action.

26. Appellate decisions uniformly recognize the importance of the payment of rent or use and occupancy by a tenant. *See*, Rae v. Sutbros Realty, 6 AD2d 716, 174 NYS2d 871 (2nd Dept. 1958) *aff'd* 6 NY2d 963, 191 NYS2d 163 (1959); 61 West 62nd Owners Corp. v. Harkness Apartment Owners Corp. 173 AD2d 372, 570 NYS2d 8 (1st Dept. 1991); 4504 New Utrecht Avenue Corp. v. Pita Parlor, 143 AD2d 171, 531 NYS2d 622 (2nd Dept. 1988); Abright v. Shapiro, 92 AD2d 452, 458 NYS2d 913 (1st Dept. 1983).

27. As the Appellate Division has explained, in granting rent or use and occupancy *pendente lite*:

> Plaintiffs should not be entitled to continue occupancy of the premises without paying for its use. Balancing the equities, Defendants are entitled to the monthly payments for rent or use and occupancy, if only to maintain the status quo until rendition of a final judgment...

Abright v. Shapiro, 458 NYS2d at 914-195.

28. The conditioning of injunctive relief upon the payment of rent or use and occupancy includes both past and prospective payments. *See* Lexington Ave. & 42nd St. Corp. v. 380 Lexchamp Operating, Inc., 205 AD2d 421, 613 NYS2d 402 (1st Dept. 1994).

29. Thus, any grant of injunctive relief should be conditioned upon the payment of the monthly rent/use and occupancy which has and continues to accrue to defendant.

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NY, NY 10013-3993
(212) 431-1300

30. Moreover, in Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Assocs., 93 NY2d 508, 515, 693 NYS2d 91, 95 (1999), the Court of Appeals stressed that a *Yellowstone* injunction does not alter the parties' rights and obligations under the lease, stating, in pertinent part, that:

> ... the limited purpose of a *Yellowstone* injunction: [is] to stop the running of the applicable cure period ...
>
> * * *
>
> The point of reference for defining the rights of the parties is not the court order; rather, it is the lease itself. ... The *Yellowstone* injunction protected the firm from eviction; it did not rewrite the lease.

31. Therefore, if the Court decides to grant plaintiff a *Yellowstone* preliminary injunction, it should be conditioned upon plaintiff being required to immediately furnish the landlord with the requisite insurance policies evidencing coverage of the type, in the amounts and for the periods required by the Lease.

WHEREFORE, plaintiff's motion should be denied and defendant should be granted such other, further and different relief as is just and proper.

Dated: New York, New York
December 16, 2014

DAVID R. BRODY

BORAH, GOLDSTEIN, ALTSCHULER, NAHINS & GOIDEL, P.C.
377 BROADWAY
NY, NY 10013-3993
(212) 431-1300