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Ronald Benderson 1995 Trust v Erie County Med. Ctr. Corp.
2021 NY Slip Op 21133
Decided on April 2, 2021
Supreme Court, Erie County
Walker, J.
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Decided on April 2, 2021

Supreme Court, Erie County

Ronald Benderson 1995 Trust, Plaintiff, .

against

Erie County Medical Center Corporation, Defendant.

815678/2020

APPEARANCES:

PHILLIPS LYTLE LLP

David J. McNamara, Esq., Of Counsel

William V. Rossi, Esq., Of Counsel

Attorneys for Plaintiff

RUPP BAASE PFALZGRAF CUNNINGHAM, LLC

R. Anthony Rupp, III, Esq., Of Counsel

Elizabeth A. Holmes, Esq., Of Counsel

James R. O'Connor, Esq., Of Counsel

Attorneys for Defendant

Timothy J. Walker, J.

Plaintiff has moved, pursuant to CPLR sections 6301, 6312(c), and 6313(a), for a *Yellowstone* injunction and a preliminary injunction (NYSCEF Doc. 14, *et. seq*. ; Motion No. 1). Defendant has cross-moved, pursuant to CPLR 6314, for an order vacating the Temporary Restraining Order, issued on December 21, 2020 (the "TRO") (Doc. 23).

BACKGROUND

The New York State legislature formed Defendant as a public benefit corporation in January 2004 "to develop and manage a healthcare system which would provide healthcare services and health facilities for the benefit of the residents of the State and . . . [Erie] [*2]County, including to persons in need of healthcare services who lack ability to pay [FN1] . At the time, the Erie County Medical Center (the "Hospital") was a small county hospital offering primarily inpatient services through its emergency department to a mostly localized Erie County-based patient population.

In conjunction with Defendant's takeover of the Hospital, the Erie County Legislature passed a resolution ("Resolution") and local law ("Local Law") approving the development of retail operations in ground floor space adjoining the Hospital's main lobby that was not deemed required for government purposes (the "Lobby Space") (Doc. 2, Ex. B). The Local Law allowed the County to enter into a lease agreement with non-party, Benderson Development Company, Inc. ("Benderson Development"), and the Resolution required Benderson Development to focus "on healthcare related enterprises such as a retail pharmacy, optical services, durable medical goods as well as other retail services that would be viewed as a desirable convenience for employees, patients and visitors" (*Id*).

The Local Law further required Benderson Development to pay fair consideration for the Lobby Space based upon the "cost to the Benderson Development Company, Inc. of renovating such space for retail use, the fair rental value of similar property, and the benefit to be derived by the County from the retail services and conveniences that will be provided to the Erie County Medical Center's patients, families, visitors and employees"' (*Id).*

On August 29, 2001, Benderson Development and Defendant entered into a lease, in connection with the Lobby Space (the "Lease") (Doc. 2). By written assignment dated June 24, 2002, and as permitted by Section 4 of the Lease, Benderson Development assigned the Lease to Plaintiff (Doc. 3).

Under the Lease, Defendant agreed to provide Plaintiff with 3,920 square feet of commercial space for retail business and related services in the Lobby Space, including the right to sub-let the Lobby Space to one or more subtenants (Doc. 2, p. 2). The initial term of the Lease was ten (10) years, commencing on the first date that a subtenant opened for business at the Lobby Space, and the term commenced on or about May 22, 2003.

With respect to rent, the Lease provides in relevant part, as follows:

> Once all of the rentable space in the Demised Premises [i.e., the Lobby Space] has been sublet and each subtenant is open for business (the "Full Rent Commencement Date") Lessee shall pay to Lessor an annual rental of $19,600.00 payable in equal monthly installments of $1,633.33 each for each year of the term (the "Full Rent") (*Id*., at p. 1).

The Lease further provides that rent would be pro-rated, unless and until the Full Rent Commencement Date occurred. Specifically, upon commencement, the Lease required

"Lessee to pay to Lessor a portion of the Full Rent (the "Partial Rent")," and expressly defines Partial Rent, as follows:

> The Partial Rent shall be determined by multiplying the Full Rent due for each month by a fraction the numerator of which is the total combined square footage of each subtenant open for business in the Demised Premises and the denominator of which is the total [*3]square footage of the Demised Premises (*Id*.).

Following execution of the Lease, Defendant determined to install public restrooms in approximately 854 square feet of the Lobby Space, which reduced the area of commercial space available to be sublet to 3,066 square feet [FN2] .

Plaintiff began paying Partial Rent in accordance with the Lease upon the commencement date of May 22, 2003, and paid escalated monthly rent payments as additional space was sub-leased.

Section 24 of the Lease provides Plaintiff the option to renew the Lease for a second ten-year term (the "Renewal Option"), and it specifies that the full rent for the second ten-year term would be increased from $1,633.33 per month to $1,796.67, per month (*Id*., at p. 6). The Renewal Option was silent as to whether it cancelled or modified the pro-rated calculation of Partial Rent under the Lease.

On August 22, 2011, Plaintiff exercised the Renewal Option to renew the Lease, and confirmed that the second ten-year term would commence on June 1, 2013, and end on May 31, 2023.

On August 23, 2011, Plaintiff served Defendant with a revised notice, expressly clarifying that monthly rent for the renewal period of $1,796.67 would be "multiplied by the Subtenant occupancy rate, which is currently set forth at 78%" (Doc. No. 4). Accordingly, following renewal and commencing on June 1, 2013, Plaintiff paid rent to Defendant at the pro-rated amount of $1,405.25, based on occupancy as of that date in the amount of 78.21% [FN3] . Plaintiff timely paid monthly rent at this amount through October 2020 (Doc. 5). During this period, Defendant accepted monthly rent in the amount of $1,405.25 without objection, and never gave notice of any default or objection, or otherwise suggested that any default had occurred under the Lease.

Since the time the lease was signed in 2001, Defendant has significantly expanded its physical footprint and increased the flow of patients and visitors to the Hospital. For example, in 2015, the Hospital was certified as a Level 1 Trauma Center, one (1) of only five (5) to receive this designation in New York State, and the only such center in Western New York, increasing its status as a major medical institution throughout the region.

In 2013, Defendant opened the Terrace View Longterm Care Facility, adding 390 on-campus beds to the 573 inpatient beds already offered by Defendant at the Hospital. In 2014, the Snyder Medical Office Building opened. It operates as a Center for Cancer Care and provides an additional four (4) surgical suites. Also in 2014, Defendant opened its Comprehensive [*4]Psychiatric Emergency Program, an emergency psychiatric service open 24/7 for psychiatric patients. All of these initiatives involved the construction and development of new buildings in proximity to the Hospital, intended to bring more specialty care and traffic to what has developed into a medical campus (the "Medical Campus").

In 2020, Defendant opened its new, state of the art emergency department, allowing the old emergency space to be re-purposed for other clinical needs.

From 2019 through the present, Defendant further invested in the presentation of the Hospital and Medical Campus with the opening of the new Russell J. Salvatore Atrium lobby space and the renovations of the Hospital's building envelope, which included a repainting of the entire main building and replacement of all of the Hospital windows.

Admissions and persons seeking medical treatment at the Hospital has grown significantly in the past decade. From 2010 to 2019, inpatient admissions increased from 15,007 to 19,996; emergency department visits increased from 58,090 to 69,391; and surgeries increased from 9,159 to 13,808 at the Hospital. Due to this growth, Defendant is the largest employer in the 14215 zip code, employing over 3,500 individuals.

Despite these changes at the Hospital and the Medical Campus, and the increases in patients served, Defendant contends that the portion of the Lobby Space utilized by Plaintiff has remained stagnant, and that Plaintiff has consistently failed to engage either Defendant or the Grider Street community in an effort to meet the needs of the Medical Campus' population.

Although Plaintiff currently sub-leases a portion of the Lobby Space to a pharmacy, Defendant contends that Plaintiff has historically filled the majority of the Lobby Space with fast-food chains, such as Tim Hortons, Subway, and Mighty Taco, despite the Erie County Legislature's directive that the Lobby Space be leased to "healthcare related enterprises" (*see* Local Law at Doc. 2, Ex. B).

Currently, Plaintiff pays Defendant approximately $4.58 or $3.58, per square foot, for the Lobby Space, depending on whether the leased space totals 3,066 or 3,920 square feet [FN4] . Defendant contends both figures are well below fair market value for the space or similar retail space.

In December 2020, Defendant engaged Howard P. Schultz & Associates, LLC, as its appraisal expert to appraise the Lobby Space, and the resultant appraisal determined that Defendant's combined operating expenses were approximately $7.00 per square foot, resulting in a significant net loss to Defendant for the Lobby Space (Doc. 27, Ex. A, p. 25).

Despite the Hospital and the Medical Campus' growth in recent years, their respective operations have been affected significantly by the COVID-19 pandemic (the "Pandemic"). Defendant currently faces an approximate $90 million deficit as a result of the Pandemic, even after receiving $52 million in CARES Act provider funding relief grants.Section 10 of the Lease, entitled "Lessee's Default," provides, in relevant part, as follows:

If Lessee defaults in the payment of rent or defaults in the performance of any of the other covenants or conditions in this agreement, Lessor shall give Lessee notice of such default and if [*5]Lessee does not cure any default with thirty (30) days, after the giving of such notice (or if such other default is of such nature that it cannot be completely cured within such period, if Lessee does not commence such curing within such thirty (30) days and thereafter proceed with reasonable diligence and in good faith to cure such default), then Lessor may terminate this Lease on not less than thirty (30) days' notice to Lessee (NYSCEF Doc. No. 2, pp. 3-4).

By letter dated September 28, 2020, Defendant sought to provide Plaintiff with notice of a default under the Lease (the "Notice Letter") (Doc. 6). However, the Notice Letter was mailed to Benderson Development (not Plaintiff), at an address that is not Plaintiff's address, despite that on July 11, 2012, Plaintiff provided written notice to Defendant of its new address

to which Legal Notices should be directed, "effective immediately," at 7978 Cooper Creek Blvd. Suite 100, University Park, FL, 34201 (Doc. 7).

The Notice Letter claimed for the first time that, six (6) years earlier, on an unspecified date in 2014, the "Full Rent Commencement Date" had occurred, because as of that unspecified date, "all the rentable space in the Demised Premises ha[d] been sublet and each subtenant [was] open for business." Accordingly, the Notice Letter declared "Lessee shall pay to Lessor an annual rental of $19,600 payable in equal monthly installments of $1,633.33 each for each year of the term" (*Id*.).

The Notice Letter further stated:

> Additionally, the renewal option set forth in Section 24 of the [L]ease does not include a"Partial Rent' period; it only permits for 'new annual rent of $21,560.00 payable in equal monthly installments of $1,796.67 each' upon exercising the option. Nevertheless, Benderson (sic) has continued to pay only 'Partial Rent' of $1,405.25/month for the space. Accordingly, [Defendant] is providing notice of default in accordance with the Lease agreement. Please ensure the default is cured within thirty (30) days to avoid termination of the Lease (*Id.*).

Over the next few months, the parties were not successful in resolving their disputes and, on November 14, 2020, Defendant directed Plaintiff to "quit and surrender" the Lobby Space, effective December 16, 2020 (Doc. 9).

On March 15, 2021, the Court heard oral argument of the applications (virtually, via Microsoft TEAMS).

DISCUSSION

Preliminarily, the Court has reviewed the COVID-19 Emergency Protect Our Small Business Act of 2021, enacted by the New York State Legislature on March 9, 2021, and has determined (and the parties concede) that it does not apply to this matter (*see* Docs. 36 and 37).

Defendant' Notice of Default

On March 7, 2020, New York State Governor, Andrew Cuomo, issued Executive Order 202 declaring a State Disaster Emergency for the State of New York in response to the spread of the coronavirus pandemic (the "Pandemic"). Executive Order 202 temporarily suspended or modified existing laws and procedures to address the public health emergency created by the Pandemic. On July 6, 2020, the Governor issued Executive Order 202.48, which reaffirmed and expressly continued the State moratorium on commercial evictions, prohibiting "the initiation of a proceeding or enforcement of either an eviction of any . . . commercial tenant" (the "Moratorium"), and on October 20, 2020, the Governor issued Executive Order 202.70, which continued the Moratorium as to commercial tenants through at least January 1, 2021.

Defendant demanded that Plaintiff "quit and surrender the Demised Premises" on December 16, 2020 (Doc. 1, ¶ 42). Thus, the Notice Letter was void at the time it was issued (on September 28, 2020), because it conflicted with the Moratorium on commercial evictions.

The Notice Letter is also void, because it was incorrectly addressed to Benderson Development (as opposed to Plaintiff), despite the express notice that the Lease had been assigned to Plaintiff (Doc. 3). In 2012, Benderson Development provided Defendant with explicit instructions to direct all legal notices to Plaintiff at a new address, which the Notice Letter ignored (Doc. 7). Such notice provisions are strictly construed and where, as here, the Notice Letter was sent to the wrong entity at the wrong address, it failed to trigger the commencement of the cure period (*E. 4th Street Garage v. L.B. Mgmt. Co.*, 172 AD2d 292 [1st Dept 1991] [holding notice sent in name of incorrect agent for landlord was ineffective to terminate commercial lease and affirming grant of *Yellowstone* injunction]).

The Notice Letter was also so impermissibly vague that it was insufficient to commence a "cure" period, as a matter of law. A commercial landlord's default notice must be "clear, unambiguous, and unequivocal to serve as the catalyst which terminates a leasehold" (*Ellivkroy Realty Corp. v. HDP 86 Sponsor Corp.*, 162 AD2d 238, 238 [1st Dept 1990]). Defendant identified two (2) different and logically inconsistent rental rates; i.e., Plaintiff should have started

paying $1,633.33 per month in 2014, but "additionally," Plaintiff should have started paying the higher amount of $1,796.67, a year earlier, in 2013 (Doc. 15, ¶¶ 27-28; Doc. 6).

In addition, Defendant did not explain how Plaintiff could "cure" the alleged breach (*Id*., at ¶ 28). Instead, it asserted baldly that Plaintiff was in default for paying an amount Defendant had accepted without objection for approximately ninety (90) consecutive months, and concluded that Plaintiff had thirty (30) days to "cure," with no directive as to what "cure" was required (*Id*). Notably, the Notice Letter was silent as to whether "cure" meant paying increased rent moving forward, paying back-rent for years in the past, or which amount of rent would apply in either case (*Id*). These ambiguities rendered the Notice Letter insufficient to commence a "cure" period, as a matter of law. Thus, the "cure" period could not have expired, because it was never commenced.

Accordingly, Plaintiff is entitled to the relief requested.

While not required to do so, the Court addresses the parties' remaining contentions, in order to provide them with a full record.

Plaintiff's Application for a Yellowstone Injunction

The purpose of a *Yellowstone* injunction is to maintain the status quo "so that a commercial tenant may protect its valuable property interest in the Lease while challenging the landlord's assessment of its rights" (*225 E. 36th Street Garagar Corp. v. 221 E. 36th Owners Corp*., 211 AD2d 420 [1st Dept 1995]). A *Yellowstone* injunction provides "a stay tolling the running of the cure period so that after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold" *(Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs*., 93 NY2d 508, 514 [1999], quoting *225 E. 36th Street*, 211 AD2d at 421).

Likelihood of Success on the Merits

In requesting a *Yellowstone* injunction, Plaintiff 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 [*6]of vacating the premises" (*Graubard*, 93 NY2d at 514). This requires "far less than the showing normally expected for the grant of preliminary injunctive relief" (*Golub Corp v. Northeastern Industrial Park, Inc.*, 188 AD2d 729,730 [3d Dept 1992]). *Yellowstone* injunctions are "routinely granted to maintain the status quo and prevent forfeiture of the lease while the parties litigate their dispute" (*Pursue Pharma, LP v. Ardsley Partners*, LP, 5 AD3d 654, 655-56 [2d Dept 2004]).

Defendant contends that Plaintiff is unable to satisfy the first prong of entitlement to a *Yellowstone* injunction, because the Lease violates the Local Law and the Resolution.

Lands held or conveyed for public use cannot be alienated for private use without specific authorization from the legislature (*10 E. Realty, LLC v. Inc. Vill. of Valley Stream*, 17 AD3d 474, 476 [2d Dept 2005]). The Legislature ultimately controls the uses of public places, and the only powers in this respect possessed by a municipality are derivative (*Lake George Steamboat Co. v. Blais*, 30 NY2d 48, 52 [1972] ["legislative sanction must be clear and certain to permit a municipality to lease public property for private purposes"]).

Defendant contends that Plaintiff has made no effort to operate the Lobby Space for a public purpose, as required by the Local Law and the Resolution, but instead has converted the Lobby Space into its own profit-making enterprise at the expense of the Erie County taxpayers. The operative language of the Local law and Resolution provide as follows:

Resolution

WHEREAS, the RFP [Request For Proposal] specified that in recruiting tenants, the developer should focus on healthcare related enterprises such as a retail pharmacy, optical services, durable medical goods as well as other retail services that would be viewed as a desirable convenience for employees, patients, and visitors . . . (Doc. 2, Ex. B).

Local Law

The Erie County Legislature hereby finds and determines that . . . [the Lobby Space] can best be utilized to the County's and the Erie County Medical Center's benefit by permitting the Erie County

Medical Center to lease said property for a fair and reasonable consideration to the Benderson Development Company . . . . Said property would be used as a retail center for the benefit of the Erie County Medical Center's patients, families, visitors and employees (*Id*.).

Defendant contends that Plaintiff has failed to operate the Lobby Space for a public purpose, because Plaintiff's subtenants have routinely consisted of fast-food restaurants, such as Mighty Taco, Tim Hortons, and Subway. While Plaintiff also leases to a pharmacy, it is the sole business that qualifies as "healthcare related enterprises such as a retail pharmacy, optical services, and/or durable medical goods," as required by the Resolution. The Local Law also refers to subleasing to "other retail services that would be viewed as a desirable convenience for employees, patients, and visitors," and the fast-food restaurants qualify as such "other retail services" that "employees, patients, and visitors" would be viewed as "desirable."

However, the point is not lost on the Court that Plaintiff has subleased the majority of the Lobby Space to fast food restaurants that typically do not provide an abundance of healthy food choices to its patrons within a hospital setting.

Moreover, it is clear that the Lobby Space is no longer being leased to Plaintiff "for a fair [*7]and reasonable consideration," as required by the Local Law. Defendant's appraisal expert opines that the current fair market value of the Lobby Space ranges between $28 to $38 per square foot. According to Defendant's expert, Plaintiff is currently paying $4.30 per square foot for the Lobby Space, which is well below fair market value for such Space, and is also less than Defendant's operating expenses to maintain the Lobby Space, which amounts to approximately $7.00 per square foot (Doc. 27, Ex. A, p. 25). Plaintiff disputes these findings, in passing, at best. Thus, due to the substantial increase in the fair market value of the Lobby Space in the twenty (20) years since the Lease was signed, Plaintiff - depending on what it charges the subtenants in rent (and whether is has recouped its "cost ... of renovating such space for retail use"), may be reaping a substantial financial benefit at the expense of the Erie County taxpayers, and the public-purpose objectives may longer be primary.

A public/private enterprise fails to qualify as a valid public purpose where the benefit accrues solely to the private party (*Denihan Enterprises v. O'Dwyer*, 302 NY 451 [1951]).

However, where the private benefit is "incidental" to the proposed public purpose, the proposed public/private project will not be invalidated (*Id.*, at p. 458; *see also, Murphy v. Erie County*, 28 NY2d 80, 88 [1971]).

In the instant matter, while the **concept** of Defendant leasing the Lobby Space to Plaintiff, according to the terms of the Local Law and Resolution, does not violate the public purpose requirements of the parties' public/private venture, the manner in which the venture has **evolved** may render it in violation of public purpose requirements. The current subtenant mix is aruably inconsistent with the Local Law and Resolution, and Plaintiff's current rent is dramatically below market value, to the detriment of Erie County's taxpayers. However, there is no mechanism by which Defendant may be permitted to reform the Lease, because public entities (like Defendant) are "treated no differently from private parties with respect to contractual obligations" (*Ecogen Wind LLC v. Town of Prattsburg Town Bd.*, 112 AD3d 1282, 1285 [4th Dept 2013]).

Defendant next contends that the Lease is unconscionable and constitutes a public waste However, while the rent Plaintiff currently pays to Defendant may be viewed as well below fair market value, the terms of the Lease were not unconscionable at the time the parties entered into the Lease in 2001 and, as previously stated, the Court may not reform the Lease.

Defendant further contends that the Lease violates the Gift and Loan Clause of the State Constitution, which prohibits a county from giving or loaning any "money or property to or in aid of any individual, or private corporation or association, or private undertaking . . ." (NY Const., art. VIII, § 1). The "Gift and Loan Clause prohibits a municipality from expending money for the benefit of a private individual or concern unless the expenditure is in furtherance of a public

purpose and the municipality is contractually or statutorily required to do so" (*Landmark West v. City of New York*, 9 Misc 3d 563, 569 [Sup. Ct. 2005]).

Ecogen is particularly instructive, because its holding was in the context of a challenge to the terms of a settlement agreement on the ground that it was "illegal and constituted a gratuitous and invalid act to grant [petitioners] 'vested rights' where the [Town] Board ha[d] no authority to do so" (*Id.*, at 1284). Defendant makes similar claims of illegality and improper gifting herein.

Legislative enactments "enjoy a strong presumption of constitutionality," thus the burden [*8]to un-do legislative action as an improper "gift" is "exceedingly strong," *i.e.,* "beyond a reasonable doubt" (*Bordeleau v. State*, 18NY3d 305, 313 [2011]). Having already determined that the Lease served a valid public purpose at the time the parties entered into it, Defendant is unable to meet this heavy burden.

Defendant relies on *Grand Realty Co. v. City of White Plains* (125 AD2d 639, 639-40 [2d Dept 1986]), as support for its contention that the Lease violates the Gift and Loan Clause of the State Constitution (the "Clause"). *Grand Realty* holds that plaintiff asserted a valid cause of action under the Clause where it alleged that the consideration the municipality received for certain parcels of real property was grossly disproportionate to their fair market value. *Grand Realty* is distinguishable from the instant matter, because the plaintiff challenged the transaction at the time the municipality entered into it. In the instant matter, however, the Lease did not violate the Clause at the time the parties entered into it in 2001. That its current terms are likely heavily skewed in favor of Plaintiff may not serve as a basis to reform it.

Defendant contends further that Plaintiff has been in breach of the Lease since its renewal in 2001, because it has failed to pay the full rent since that time. It is undisputed that since renewal, Plaintiff has paid a reduced rent; to wit, 78%, based on the "Partial Rent" language of the Lease, because Plaintiff views the public restrooms to be excluded from the Lobby Space.

The pertinent provisions of the Lease provide as follows:

LESSEE COVENANTS TO PAY RENT

Once all of the rentable space in the Demised Premises [i.e., the Lobby Space] has been sublet and each subtenant is open for business (the "Full Rent Commencement Date") Lessee shall pay to Lessor an annual rental of $19,600.00 payable in equal monthly installments of $1,633.33 each for each year of the term (the "Full Rent")

Beginning upon the Lease Term Commencement Date [FN5] through the Full Rent Commencement Date, Lessee shall pay to Lessor a portion of the Full Rent (the "Partial Rent"). The Partial Rent shall be determined by multiplying the Full Rent due for each month

by a fraction the numerator of which is the total combined square footage of each subtenant open for business in the Demised Premises and the denominator of which is the total square footage of the Demised Premises (Doc. 1, p. 1).

. . .

OPTION

> 24. Lessee shall have the option of renewing this Lease for an additional term of ten (10) years upon the expiration of the original term upon the same terms and conditions as authorized by the Legislature of Erie County pursuant to . . . [the Local Law and Resolution], except for a new annual rental of $21,560.00 payable in monthly equal installments of $1,796.67 each . . . (*Id*., at §24, p. 6).

The plain language of the "Lease Covenants to Pay Rent" provision states that Plaintiff's right to pay partial rent expires on the date that all of the Lobby Space's rentable space has been [*9]sublet and the subtenants have opened for business, defined as the "Full Rent Commencement Date." The Lease provides that Plaintiff may pay partial rent **prior to**(not after) the Full Rent Commencement Date.

The fact that the public restrooms, installed after the Lease was executed, detract from leaseable space, is irrelevant. The parties never amended the Lease to account for the bathrooms. Nor does the Court accept Plaintiff's contention that Plaintiff's rent should not be based on the unrentable bathroom space, because the presence of the public bathrooms is a benefit to the Lobby Space.

The Court further rejects Plaintiff's contention that Defendant's interpretation of the Lease favors the "Option" clause (section 24) over the rent provisions, because there is no inconsistency between these provisions. The provisions are consistent, as neither provision permits the payment of partial rent after the Full Rent Commencement Date.

It is undisputed that over the past seven (7) years, Plaintiff paid partial rent after the Full Rent Commencement Date, by excising the public restroom space from the Lobby Space. Plaintiff contends that the parties' course of conduct in so doing should control (*see Brook Shopping Centers, Inc. v. F.W. Woolworth Co.*, 215 AD2d 620 [2d Dept 1995]] [where amount

of rent disputed, enforceable contract created by course of conduct where landlord accepted a percentage of rent from tenant over 15-20 years]). The Court rejects this contention, because the Lease terms are unambiguous, and Defendant erroneously accepted partial rent for the period after the Full Rent Commencement Date.

Accordingly, at all times following the Full Lease Commencement Date, Plaintiff should have paid rent in the amount of $1,633.33 per month until the Lease was renewed, and thereafter at the rate of $1,796.67 per month, following renewal.

Irreparable Harm

Turning to irreparable harm, it is well settled that the loss of a leasehold constitutes irreparable harm (*Concourse Rehabilitation and Nursing Center, Inc. v. Gracon Assocs*., 64 AD3d 405 [1st Dept 2009]). Moreover, a contrary finding would vitiate, and be inconsistent with a *Yellowstone* injunction, as such injunctions are granted "routinely to avoid forfeiture of the tenant's substantial interest in the leasehold premises (*Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs.*, 93 NY2d 508, 514 [1999]).

Balancing of the Equities

Equity disfavors "forfeitures of valuable leasehold interests" (*Zaid Theatre Corp. v. Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]), particularly where, as here, the notice of default is a nullity.

In light of the foregoing, it is hereby

ORDERED, that Plaintiff's application for a preliminary injunction is granted, and the TRO is hereby converted to a preliminary injunction and it is further

ORDERED, that Defendant's cross-motion to vacate the TRO is denied.

This constitutes the Decision and Order of this Court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: April 2, 2021

Buffalo, New York

_____

HON. TIMOTHY J. WALKER, J.C.C.

Acting Supreme Court Justice

Presiding Justice, Commercial Division

8th Judicial District

Footnotes

Footnote 1:*See* https://www.ecmc.edu/about-ecmc/corporate-governance. The Court has discretion to "take judicial notice of material derived from official government websites" (*In re LaSonde v. Seabrook*, 89 AD3d 132, n.8 [1st Dept 2011]).

Footnote 2: Mark Chait, Executive Director of non-party, Benderson Development Company, LLC, stated in his affidavit in support of Plaintiff's application that the square footage of the bathrooms in the Lobby Space totals 840 square feet (Doc. 15, ¶9). In an electronic mail to the Court's Confidential Law Clerk , dated March 5, 2021, Plaintiff's counsel stated that such figure was a scrivener's error, and that the bathrooms occupy 854 square feet of the Lobby Space.

Footnote 3: As of renewal, Plaintiff had sub-let 100% of the available area to be sub-let. That is, subtracting 854 square feet of restroom space from the total Lobby Space of 3,920 square feet, Plaintiff leased 100% of the remaining 3,066 square feet, which amounts to 78.21% of 3,920.

Footnote 4: Monthly rent of $1,405.25 divided by 3,066 square feet equals $4.58, per square foot; divided by 3,920 square feet equals $3.58, per square foot.

Footnote 5: The Lease defines "Lease Term Commencement Date" as "the date the first

subtenant opens for business in the Demised Premises" (Doc. 1, p.1).

Return to Decision List