SCAN

SHORT FORM ORDER

SUPREME COURT-STATE OF NEW YORK

PRESENT:

HON. BRUCE D. ALPERT

Justice

TRIAL/IAS, PART 8

NEXTEL OF NEW YORK, INC.,

Petitioner,

Motion Sequence #1

Index No. 9277/01

Motion Date: October 30, 2001

-against-

TIME MANAGEMENT CORPORATION,

Respondent.

The following papers read on this application for summary judgment:

Notice of Motion	X
Answering Affirmation	X
Reply Affirmation	X
Memorandum of Law	X

Upon the foregoing papers it is ordered that this application by petitioner, Nextel of New York, Inc., for an order awarding summary judgment and possession is denied.

Petitioner, Nextel of New York, Inc. (hereinafter Nextel), is a subsidiary of Nextel Communications, Inc., a company which provides mobile phone communications services. Time Management Corporation (hereinafter TMC) is the owner of premises located at 595 Stewart

Avenue in Garden City, New York. Petitioner commenced this summary proceeding pursuant to RPAPL § 713(10) in the District Court to recover possession of a portion of the subject premises under a written agreement executed by TMC on June 30, 2000.

Nextel also commenced an action against TMC in this Court under Index No. 4118/01and secured a *Yellowstone* injunction by Order dated May 24, 2001. Pursuant thereto, the summary proceeding was removed from its forum and transferred to this Court, with a directive that the two matters be joined for trial.

Nextel now seeks summary judgment in the removed proceeding in order to construct a cell site, "a relay station consisting of antennas and computer equipment which facilitate the transmission of cellular telephone communications." (Matter of Cellular Telephone Company v Rosenberg, 153 Misc2d 302, 303, n. 1, affd 188 AD2d 648, affd 82 NY2d 364)

It is undisputed that TMC, by its Vice-President John Cacoulidis, on June 30, 2000, executed an undated self-described "Communications Site Lease Agreement (Building)" (hereinafter the Agreement) with Nextel for premises located at 595 Steward Avenue, Garden City, New York. The Agreement provides for the "lease" of "two hundred (200) square feet of interior space in the Building and space either adjacent to or on the roof of the Building and all access and utility easements, if any", and provides that such "premises" may be used by the lessee "for any activity in connection with the provision of communications services."

The Agreement provides for rent at the rate of $2,000 per month and a term of five years,

commencing "upon either the date Lessee commences construction of the Lessee Facilities ... or ninety (90) days after the full execution of this Agreement, whichever first occurs."

Annexed to the Agreement are three drawings: (1) a Roof Plan bearing the legend LE-1; (2) an Equipment Room Plan bearing the legend LE-2 and a note that the drawing is for "illustration purposes only" and "subject to verification"; and (3) an Elevation drawing bearing the legend LE-3, containing the same caveats (hereinafter the LE drawings). LE-2 and LE-3 also bear the legend "lease exhibit".

The Agreement does not refer to the LE drawings, which provide some detail as to placement of the computer equipment, cables and antennae. Rather, it refers to two other exhibits, exhibit "A", a "description of Land" containing the building address (595 Steward Avenue), and exhibit "B", a *blank* "description of Premises".

Nextel began paying rent in November of 2000, but did not execute the Agreement. No attempt to commence construction of the "Lessee Facilities" was made until 2001. TMC prevented Nextel from commencing construction or taking possession, refused any further tender of rent and attempted to return all rent paid. By letter dated February 2, 2001, TMC notified Nextel that the latter's plans for construction "contemplated use of the building greatly in excess of the lease plans and the negotiations thereto." TMC advised that under the termination provisions of "paragraph 10 of the lease" it would terminate, unless Nextel presented "plans in conformance with the lease" within the sixty day cure period under the Agreement.

It is conceded that Nextel did not present a conforming plan before seeking a *Yellowstone* injunction to prevent expiration of the cure period. It is undisputed that there are at least four differing versions of the LE drawings, and that the version presented to the building department in an effort to obtain necessary municipal approvals was not exhibited to TMC prior to such presentation.

It also merits mention that there is a version of the Agreement dated August 11, 2000 executed by Nextel through its Vice-President Tamara L. Casey, which Nextel now repudiates.

Petitioner seeks relief under the summary provisions of CPLR 409(b) and 3212(b), averring that there are no issues of fact, as it now accepts the version of the Agreement executed by TMC and the LE drawings annexed to the original document.

Petitioner's reliance upon the issuance of a *Yellowstone* injunction (see, First National Stores, Inc. v Yellowstone Shopping Center, Inc., 21 NY2d 630) as law of the case is misplaced. The limited purpose of a *Yellowstone* injunction is "to allow a tenant confronted by a threat of termination of the lease to obtain 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." (Empire State Building Associates v Trump Empire State Partners, 245 AD2d 225, 227 [1st Dept.] [emphasis supplied]; see also, Graubard Mollen Horowitz Pomerantz & Shapiro v 600 Third Avenue Associates, 93 NY2d 508, 514 [staying the cure period merely preserves the lease "until the merits of the dispute could be resolved in court.")

A *Yellowstone* is a species of a preliminary or temporary injunction (see, Metropolis Seaport Associates v South Street Seaport Corporation, 253 AD2d 663 [1st Dept.]), the grant or refusal of which "does not constitute the law of the case or an adjudication on the merits, and *the issues must be tried to the same extent as though no temporary injunction had been applied for.*" (Walker Memorial Baptist Church, Inc. v Saunders, 285 NY 462, 474, rearg den 286 NY 607 [emphasis supplied])

Generally, only the issue of breach is determined on an application for a *Yellowstone*, as the bona fides of the written lease terms of a tenant in possession would not be in controversy. Here, though the issue of breach appears to be resolved by petitioner's willingness to abandon the version of the LE drawings which prompted the issuance of the February 2, 2001 termination letter, the scope of Nextel's rights under the Agreement cannot be determined as a matter of law.

The Agreement does not recite that it incorporates the LE drawings, the premises are not described in Exhibit B to the Agreement and even the LE drawings appear to be in a transitional, non-final state, as they are for purposes of illustration only, with multiple variations extant. Under such circumstances, and, assuming arguendo that the Agreement provides for "the surrender of absolute possession and control of property", as required for of a lease (see, Matter of Dodgertown Homeowners Association, Inc. v City of New York, 235 AD2d 538, 539, lv den 89NY2d 809), and that it was duly delivered to the tenant (see, 219 Broadway Corp. v Alexander's, Inc., 46 NY2d 506, 511), the terms of the Agreement "including the area to be leased" cannot be determined as a matter

of law. (see, Matter of Dodgertown Homeowners Association, Inc. v. City of New York, supra)

It is also not clear that the summary remedy of RPAPL §713(10) is available to the petitioner. A special proceeding may be maintained under the governing statute where "the person in possession has entered the property or remains in possession by force or unlawful means and he or his predecessor in interest was not in quiet possession for three years before the time of the forcible or unlawful entry or detainer and the petitioner was peaceably in actual possession at the time of the forcible or unlawful entry or in constructive possession at the time of the forcible or unlawful detainer ...".

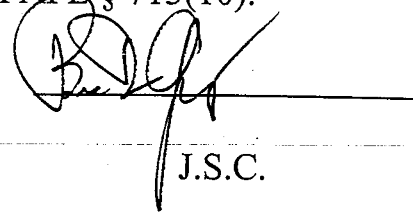
Petitioner aptly notes that constructive possession or the right to possession may be sufficient where there is a "forcible holding out" (see, The Town of Oyster Bay v Jacob, 109 App Div 613, 619), and that the "remedy is open to any one who is lawfully entitled to possession of real property and who is put out of it or kept out of it by force." (Markun v Weckstein, 100 Misc 668, 670 [App. Term, 1st Dept.])

However, under circumstances where the petitioner admittedly never took possession, it has not presented any competent evidence tending to demonstrate that the respondent or its predecessor in interest "was not in quiet possession for three years" prior to the alleged forcible or unlawful entry or detainer, a prerequisite under the statute.

Accordingly, petitioner's motion is denied on the grounds that there are issues of fact with respect to the scope of its rights under the Agreement and on the grounds that it has not made a

prima facie showing of entitlement as a matter of law under RPAPL § 713(10).

DATED: January 8, 2002



J.S.C.

ENTERED
JAN 11 2002
NASSAU COUNTY
COUNTY CLERK'S OFFICE