

**Allerand, LLC v 233 East 18th Street Company,
L.L.C.**

2004 NY Slip Op 30297(U)

July 28, 2004

Supreme Court, New York County

Docket Number: 601254/2004

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Arulano LLC

INDEX NO. 601254/04

MOTION DATE 6/9/04

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

233 EAST 18TH STREET Co. LLC

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...
Answering Affidavits -- Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1-17
18-28
29-30

Cross-Motion: Yes No

Upon the foregoing papers, ^{and Memorandum Decision annexed,} it is ordered that this motion

FILED
AUG 06 2004
NEW YORK
COUNTY CLERK'S OFFICE

ORDERED that plaintiff's order to show cause for an order enjoining defendant from terminating the subject tenancy, or commencing any proceeding to cancel said tenancy, tolling any cure period contained in the Notice to Cure, enjoining defendant from commencing any summary proceeding in the Civil Court of the City of New York to recover possession of the subject units, is denied; and it is further

ORDERED that defendant's cross-motion to dismiss the complaint pursuant to CPLR 3211 for failure to state a cause of action is granted; and it is further

ORDERED that defendant's request for an inquest to assess costs and disbursements and reasonable attorneys' fees is granted, and defendant is directed to file a note of issue and a statement of readiness along with an entered copy of this order upon the Clerk of the Trial Support Office (60 Centre Street, Room 158) no later than August 20, 2004, and shall pay the proper fees, if any; and it is further

ORDERED that all parties are directed to appear before Justice Carol Edmead, Part 35, 60 Centre Street, Rm. 543, on August 31, 2004 at 10:30AM for such assessment; and it is further

ORDERED that counsel for defendant is directed to serve a copy of this Order with Notice of Entry upon counsel for plaintiffs within 20 days from the date of entry.

This constitutes the decision and order of the court.

Dated: 7/28/04


HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
ALLERAND, LLC, RICHARD SABELLA, and
LYNN SABELLA,

Plaintiffs,

Index No. 601254/2004

DECISION/ORDER

-against-

233 EAST 18TH STREET COMPANY, L.L.C.,

Defendant.

-----X
HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiffs Richard Sabella and Lynn Sabella (the "Sabellas") and Allerand, LLC ("Allerand") (collectively "plaintiffs") seek an injunction pursuant to *First Natl. Stores v Yellowstone Shopping Center* (21 NY2d 630 [1968]), staying defendant 233 East 18th Street Company, L.L.C. ("defendant") from terminating or commencing any proceeding to terminate certain lease (the "Lease") and tolling the period to cure set forth in the Notice to Cure, dated April 22, 2004.

FILED
AUG 06 2004
NEW YORK
COUNTY CLERK'S OFFICE

The essential facts, in large part, giving rise to this action and the parties' contentions are set forth in the motions and cross-motions for summary judgment on a previously commenced and related action, *Allerand, LLC, Richard Sabella and Lynn Sabella v 233 East 18th Street Company, L.L.C.*, Index No. 102419/2004, and are incorporated by reference herein. In the related action, plaintiffs seek \$1,880,493 in damages allegedly arising from defendant's breach of the Lease when defendant refused to execute a "Recognition Instrument" in connection with a proposed sublease and from defendant's alleged tortious interference with the proposed sublease,

as well as attorneys' fees. During the pendency of that proceeding, which was commenced on February 17, 2004, plaintiffs withheld rent for the months of March and April of 2004. Consequently, defendant served a ten-day Notice to Cure. Apparently, plaintiffs continue to withhold rent.

Plaintiffs claim that the Lease between the parties is a net lease agreement, and therefore contemplates that the subject units will be sublet. Since defendant refuses to permit plaintiff Allerand to sublease the units, defendant has not only breached the Lease, but has, for all intents and purposes, constructively evicted plaintiffs from the units. Defendant cannot reasonably demand that Allerand continue to pay rent for the subject units when defendant will not permit Allerand to make the contemplated use of the units in the form of subleasing the units. Therefore, while plaintiffs stand ready to pay all taxes, mortgage payments, insurance payments and utility bills called for in the Lease, it should not be required to tender rent payments directly to defendant.

Defendant opposes *Yellowstone* injunctive relief, arguing that plaintiffs' unjustified refusal to pay rent demonstrates that they are not willing to cure their default, so as to entitle them to a *Yellowstone* injunction. Defendant also argues that plaintiffs default in rent payments solely to offset any damages it might be awarded in the related action, in violation of section 5.02 of the Lease,¹ demonstrates that plaintiffs are unwilling to cure their default.

Defendant also cross moves to dismiss plaintiffs' declaratory judgment and attorneys' fees claims pursuant to CPLR 3211 for failure to state a cause of action, and for an award for

¹ Section 5.02 of the Lease, which requires rent "when due, without notice or demand and without deduction or setoff of any amount for any reason whatsoever."

attorneys' fees in defense of this action under sections 14.02 (a) and/or section 22.02 of the Lease.² In plaintiffs' complaint, plaintiffs seek (1) a declaration stating that their obligation to pay rent is suspended until defendant cures its breach of the Lease and permits plaintiffs to sublet the subject space in accordance with the terms of the Lease, (2) a permanent injunction maintaining the status quo until the court determines the rights of the parties, and (3) attorneys' fees. Defendant argues that plaintiffs are not entitled to the declaration they seek because their obligation to pay rent is independent from any alleged breach by defendant so long as plaintiffs remain in possession. Further, since section 19.02 of the Lease provides that "Notwithstanding any subletting . . . Lessee shall and will remain fully liable for . . . all Basic Annual Rent, additional rent, and other charges" plaintiffs' obligation to pay rent is independent of any obligation of the defendant under the Lease.

Defendant also claims that plaintiffs' attorneys' fees claim lacks merit because this case is truly about plaintiffs' failure to pay rent, and not about defendant's alleged breach of the Lease as plaintiffs' allege. Furthermore, any determination regarding defendant's alleged breach of the Lease will be resolved in the related action. Defendant also notes that plaintiffs have already included the same claim for attorneys' fees in the related action. Therefore, the claim for

² Section 14.02 (a) states: "Lessee shall indemnify and save Lessor harmless from and against all liability, judgments, claims, demands, suits, actions . . . damages, costs and expenses including attorneys' fees, of any kind or nature whatsoever, due to or arising out of or from: (a) Any breach, violation or non-performance of any covenants . . . provision or agreement in this Lease set forth and contained on the part of Lessee to be fulfilled, kept, observed and performed . . ."

Section 22.02 states: "If lessor shall incur any expense, including reasonable attorneys' fees, in instituting, prosecuting, or defending any action or proceeding instituted by reason of any default by Lessee, Lessee shall reimburse Lessor for the amount of such expense."

attorneys' fees here should be dismissed as duplicative pursuant to CPLR § 3211(a) (4).

Moreover, the sole clauses in the Lease governing attorneys' fees, sections 14.02 and 22.02, inure solely to the benefit of lessor, and in the absence of any meritorious complaint for declaratory relief, plaintiffs' claim for attorneys' fees should be dismissed.

On the other hand, defendant argues that it should be awarded attorneys' fees pursuant to section 14.02 of the Lease, since plaintiffs admittedly failed to pay rent as required under the Lease, and defendant has incurred expenses to enforce payment and defend this *Yellowstone* application. Thus, it is claimed that section 22.02 supports defendant's claim for attorneys' fees.

In reply, plaintiffs add that the "no set-off clause" in the Lease was intended to prevent tenants from asserting a breach of the warranty of habitability as a defense to a non-payment proceeding. Since defendant did not commence a non-payment proceeding, and took no action to cause termination of the lease, the "no set-off clause" does not apply. Plaintiffs further argue that defendant is not entitled to attorneys' fees for defending a declaratory judgment action.

Defendant responds by adding that even if a *Yellowstone* injunction is granted, such injunction will last only pending a determination of the underlying merits of the action. Therefore, argues defendant, should the Court dismiss the complaint, any *Yellowstone* injunction becomes moot. Defendant further points out that the Lease controls the issue of attorneys' fees.

Analysis

Yellowstone Injunction

The purpose of the *Yellowstone* injunction is to maintain the status quo so that a commercial tenant may protect its valuable property interest in its lease while challenging the landlord's assessment of its rights (*see Lexington Ave. & 42nd Street Corp. v 380 Lexchamp Operating, Inc.*, 205 AD2d 421 [1st Dept 1994], *citing Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 26 [1984]). A *Yellowstone* injunction forestalls the cancellation of a lease to afford the tenant an opportunity to obtain a judicial determination of its breach, the measures necessary to cure it, and those required to bring the tenant in future compliance with the terms of the lease (*see Waldbaum, Inc. v Fifth Ave. of Long Is. Realty Assocs.*, 85 NY2d 600, 606 [1995]). In order to obtain a *Yellowstone* injunction, the tenant must demonstrate (1) the existence of a commercial lease; (2) receipt from the landlord of a notice of default thereunder, a notice to cure such default, or a threat of termination of the lease; (3) application for the issuance of an injunction, made prior to the lease's termination; and (4) the tenant's ability and desire to cure the alleged default, by any means short of vacating the premises (*New Eagle Inc. v H.R. Neumann Assoc., Inc.* 2004 N.Y. Slip Op. 50724(U); *Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225 [1st Dept 1997]; *Marathon Outdoor, LLC. v Patent Const. Sys. Div. of Harsco Corp.*, 306 AD2d 254 [2d Dept 2003]; *WPA/Partners LLC. v Port Imperial Ferry Corp.*, 307 AD2d 234 [1st Dept 2003], *citing Herzfeld & Stern, supra*). A tenant seeking a *Yellowstone* injunction must convince the court "of his desire and ability to cure the defects by any means short of vacating the premises" (*Cemco Rest., Inc. v Ten Park Ave. Tenants Corp.*, 135 AD2d 461 [1st Dept 1987]; *Jemaltown of 125th St., Inc. v Leon Betesh/Park Seen Realty Assoc.*, 115 AD2d 381, 382 [1st Dept 1985]).

Since the Court has determined the rights of the parties in the instant action, to wit: (1) that plaintiffs' are not entitled to a declaration permitting them to withhold rent until defendant cures its alleged breach, and (2) that plaintiffs' cause of action for attorneys' fees is without merit, plaintiffs' application for *Yellowstone* relief pending the determination of the rights of parties in this action is moot (*see discussion below*). In other words, since a *Yellowstone* injunction forestalls the cancellation of a lease to afford the tenant an opportunity to obtain a judicial determination of its breach, and the court has made such a determination, plaintiffs' application for a *Yellowstone* injunction is denied.

Any alleged breach by the Landlord does not relieve defendant's independent obligation to pay rent under the Lease as long as defendant remains in possession of the premises (*see Earbert Rest., Inc. v Little Luxuries, Inc.*, 99 AD2d 734, 472 NYS2d 359 [1st Dept 1984]). Notably, defendant cannot lease the units to another tenant by virtue of plaintiffs' possession. Further, plaintiffs have not alleged that they are *not* in possession of the premises, or have been deprived of possession of the units.

Furthermore, plaintiffs' claim that they are entitled to withhold rent because defendant's acts essentially amount to a constructive eviction does not serve as a basis to withhold rent. In order to claim constructive eviction, plaintiffs must allege that the landlord's wrongful acts "substantially and materially deprive[d] the tenant of the [intended] beneficial use and enjoyment of the premises" and that plaintiffs abandoned the premises as a result thereof (*Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77, 80 [1970]; *Broadway Copy Serv., Inc. v Broad-Wall Co.*, 77 AD2d 827, 431 NYS2d 13 [1st Dept 1980]; *see generally Zevnik, Horton, Guibord, McGovern, Palmer & Fognani, LLP v Sheraton Holding Corp.*, 304 AD2d 455 [1st Dept 2003]). Under the circumstances,

it cannot be said, as a matter of law, that defendant's acts have substantially or materially deprived plaintiffs of their beneficial use of the units. From the record, it appears that defendant's alleged acts have not precluded plaintiffs from resorting to the two other methods of subletting the units by either (1) subletting the units for a term no longer than the demised term, or (2) requesting defendant's consent to enter a sublease beyond the demised term as provided in section 20.02. More importantly, there is no allegation that plaintiffs have abandoned the premises (*see Refrigeration for Science, Inc. v Deacon Realty Corp.*, 70 Misc 2d 500, 334 NYS2d 418 [Supreme Court New York County 1972] [stating that where tenant has not surrendered possession of any part of the premises there is no constructive eviction or actual partial eviction, and plaintiff's obligation to pay rent, therefore, continues]). Where the tenant is not physically expelled or excluded from the premises, and did not actually abandon the premises, no cause of action for constructive eviction lies (*see 428 Camera Corp. v Tandy Corp.*, 272 AD2d 72, 707 NYS2d 101 [1st Dept 2000]). Therefore, plaintiffs' claim of constructive eviction as a basis to withhold rent during the pendency of this litigation is unavailing.

Cross-Motion

In light of plaintiffs' independent obligation to pay rent despite the alleged breach of the Lease of by defendant, plaintiff's declaratory judgment cause of action is dismissed. Dismissal is further warranted on the ground that section 5.02 of the Lease does not permit plaintiffs to withhold rent as a "setoff" for any reason. Further, the Court observes that plaintiffs' complaint in the related action demonstrates that plaintiffs could be adequately compensated for any alleged damages it suffered as a result of defendant's breach by monetary relief.

With respect to plaintiffs' claim for attorneys' fees, such claim is without merit. First, such

claim is barred under CPLR 3211(a)(4), since plaintiffs seek attorneys' fees in the related action.

Furthermore, plaintiffs are not entitled to an award of an attorney's fee absent an agreement between the parties, statutory authorization, or court rule (*Crispino v Greenpoint Mortg. Corp.*, 769 NYS2d 553 [2d Dept 2003] citing *Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491-492, 549 NYS2d 365, 548 NE2d 903; *Glatter v Chase Manhattan Bank*, 239 AD2d 68, 669 NYS2d 651). In this regard, section 14.02 (a) of the Lease permits the "lessor," who incurs expenses, including reasonable attorneys' fees, in "instituting, prosecuting, or defending any action or proceeding instituted" as a result of the Lessee's default, to seek reimbursement from the lessee for such expenses. Section 22.02 requires that the "Lessee" reimburse "Lessor" for "defending any action or proceeding instituted by reason of any default by Lessee." Thus, based on a plain reading of sections 14.02 (a) and 22.02, the attorneys' fees plaintiffs seek herein do not fall within the scope of attorneys' fees outlined in these sections. In addition, plaintiffs' claim here arises from defendant's service of the 10-day Notice to Cure based on the nonpayment of rent. Although plaintiffs' insist their nonpayment of rent is justified by defendant's breach of the Lease, for the reasons stated above, such claim is without merit.

Furthermore, plaintiffs's reliance on *Time Warner Cable v Brustowsky* (233 AD2d 150 [1st Dept 1996]) and *St. George Tower & Grill Owners Corp v Honig* (232 AD2d 475 [2d Dept 1996]) as a basis to deny attorneys' fees in favor of defendant is misplaced. In *Time Warner Cable v Brustowsky*, the Court declined to award attorneys' fees in the absence of any contractual provision. Here, sections 14.02(a) and 22.02 expressly provides for attorneys' fees under the circumstances. Further, in *St. George*, the Court declined to award attorneys' fees incurred to defendant in a declaratory judgment action challenging the refusal of the plaintiff to consent to the continuation of

the sublet. Although plaintiffs here similarly also challenge the defendant's refusal to execute a "Recognition Instrument" to facilitate plaintiffs' subletting of the units, plaintiffs advance this claim in the related action. Unlike the declaratory judgment action *St George*, the declaratory judgment action herein simply seeks a declaration that plaintiffs are not required to pay rent until defendant cures its breach, which this court deems is without merit.

Therefore, since plaintiffs withheld rent for May and April 2004 without justification, plaintiffs' claim for attorneys' fees is dismissed. Accordingly, defendant's cross-motion to dismiss the complaint, and for summary judgment on its claim for costs and attorneys' fees is granted, and plaintiffs' order to show cause for a *Yellowstone* injunction is denied.

Accordingly, it is hereby

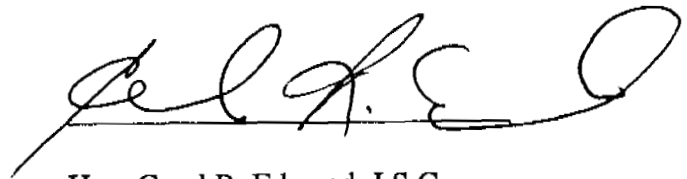
ORDERED that plaintiff's order to show cause for an order enjoining defendant from terminating the subject tenancy, or commencing any proceeding to cancel said tenancy, tolling any cure period contained in the Notice to Cure, and enjoining defendant from commencing any summary proceeding in the Civil Court of the City of New York to recover possession of the subject units, is denied; and it is further

ORDERED that defendant's cross-motion to dismiss the complaint pursuant to CPLR 3211 for failure to state a cause of action is granted; and it is further

ORDERED that defendant's request for a hearing to assess costs and disbursements and reasonable attorneys' fees is granted, and all parties are directed to appear before Justice Carol Edmead, Pt. 35, 60 Centre Street, Rm. 543, on August 31, 2004 at 10:30AM for such assessment.

This constitutes the decision and order of the court.

Dated: July 28, 2004



Hon. Carol R. Edmead, J.S.C.

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