Corbit v 440 E. 62nd St. Owners Corp.
2007 NY Slip Op 30381(U)
March 20, 2007
Supreme Court, New York County
Docket Number: 0113900
Judge: Barbara R. Kapnick
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SCANNED ON 3/28/2007

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

PRESENT: Kapnick, Justice   PART 12

INDEX NO. 113900/06

Corbit

- v -

440 E 62nd St

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
MAR 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/20/07

______ J.S.C.
BARBARA R. KAPNICK
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

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DAVID CORBIT and JUDITH M. CORBIT,

Plaintiffs,

-against-

440 EAST 62nd ST. OWNERS CORP.,

Defendant.

DECISION/ORDER
Index No. 113900/06
Motion Seq. No. 001

FILED
MAR 28 2007
COUNTY CLERK'S OFFICE
NEW YORK

BARBARA R. KAPNICK, J.:

Plaintiffs David Corbit and Judith M. Corbit move by Order to Show Cause for an order:

(1) enjoining and restraining defendant 440 East 62nd St. Owners Corp., its agents, servants and employees, from taking any action to terminate or otherwise interfere with the proprietary lease between the parties dated February 2, 2006, whether by instituting a summary proceeding or otherwise;

(2) staying the period of time within which to cure any purported default under the proprietary lease until after a determination of this action on the merits, predicated upon the matter set forth in the Notice to Cure dated September 11, 2006;

(3) granting plaintiffs a preliminary injunction pursuant to First National Stores v. Yellowstone Shopping Center, 21 N.Y.2d 630 (1968) barring defendant from taking any steps to terminate or cancel plaintiffs' tenancy in and to the subject premises;

(4) staying and tolling the expiration of the Notice and the time to cure any purported defaults in the Notice;

(5) enjoining and restraining defendant, its agents, servants and employees from taking or making further efforts to cancel or terminate the tenancy of plaintiffs in and to the subject premises including, but not limited to, serving any further notices of default, notices to terminate and commencing any action or proceeding to obtain the eviction of the plaintiffs; and

(6) vacating the Notice.

The Notice, which was sent to plaintiffs at their residence in New Hampshire, provides, in relevant part, as follows:

> PLEASE TAKE FURTHER NOTICE that your default includes a violation of paragraph 14 of the Lease in that you sublet the apartment without full compliance with the requirements of paragraph 15 of the lease and have permitted a person or persons not authorized by paragraph 14 to use or occupy the apartment without written consent of the lessor. Upon information and belief, said person is your adult daughter, Kerry. In this regard, you stated at your interview with the admissions committee of the board of directors that you intended to live in the subject premises and that it was intended for your use. In this regard, on January 23, 2006, you further signed a written agreement stating that you would reside in the subject premises and that it was intended for your use. Thereafter, when your daughter moved into and occupied the subject premises, you indicated that she was residing there temporarily and helping you with boxes. You subsequently stated that you are too sick to reside in the subject premises, that Kerry has taken your place and that, in any event, she is protected by RPL 235-f (the roommate law).

Plaintiffs claim that they purchased the apartment for use as a weekend residence with the intention of occupying the premises on a full time basis after their eventual retirement, but have been unable to use the apartment as often as they intended because Mrs.

Corbit was diagnosed with breast cancer in April 2006 and has been undergoing an extensive treatment regimen.

Plaintiffs do not dispute that in the meantime their adult daughter has been living in the apartment. However, they do dispute defendant's position that this constitutes a violation of their lease, since paragraph 14 of the proprietary lease provides, in relevant part, as follows:

> The Lessee shall not, without the written consent of the Lessor on such conditions as Lessor may prescribe, occupy or use the Apartment or permit the same or any part hereof to be occupied or used for any purpose other than as a private dwelling for the Lessee and Lessee's spouse, <u>their children</u> (emphasis supplied), grandchildren, parents, grandparents, brothers and sisters and domestic employees, and in no event shall more than one married couple occupy the Apartment without the written consent of the Lessor.

Defendant, however, contends that paragraph 14 of the proprietary lease authorized plaintiffs to permit their daughter to live in the apartment only on condition that plaintiffs reside in the apartment contemporaneously, and further argues that plaintiffs signed an affidavit sworn to on January 23, 2006 which confirms that they would be the exclusive occupants of the apartment.

"The purpose of a *Yellowstone* injunction is to maintain the status quo so that the tenant served with a notice to cure an alleged lease violation may challenge the propriety of the landlord's notice while protecting a valuable leasehold interest."

Garland v. Titan West Associates, 147 A.D.2d 304, 307 (1st Dep't 1989). See also, Purdue Pharma, LP v. Ardsley Partners, LP, 5 A.D.3d 654 (2nd Dep't 2004).

> In granting *Yellowstone* injunctions to avoid a forfeiture of the tenant's interest, courts have generally accepted far less than the showing normally required for the grant of preliminary injunctive relief. (citation omitted). Thus, a tenant seeking to avoid forfeiture of its lease is less likely to be required to demonstrate a likelihood of success, irreparable injury, and a balancing of the equities in its favor, as those terms are traditionally understood. (citations omitted).

Garland v. Titan West Associates, supra at 307.

However, the party seeking a Yellowstone injunction must generally demonstrate that:

> (1) *it holds a commercial lease* (emphasis supplied); (2) it received from the landlord either a notice of default, a notice of 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 East 36th St. Garage Corp. v. 221 East 36th Owners Corp., 211 A.D.2d 420, 421 (1st Dep't 1995). See also, Purdue Pharma, LP v. Ardsley Partners, LP, supra at 655; 37th Street Enterprises, Inc. v. 500-512 Seventh Avenue Associates, 266 A.D.2d 28 (1st Dep't 1999); Empire State Building Associates v. Trump Empire State Partners, 245 A.D.2d 225 (1st Dep't 1997).

In the instant case, there is no dispute that plaintiffs are parties to a proprietary lease in a residential building and do not hold a commercial lease. Thus, plaintiffs are not entitled to a *Yellowstone* injunction;[1] rather, plaintiffs must demonstrate a likelihood of success on the merits, irreparable injury, and a balancing of the equities in their favor, as required for obtaining a standard preliminary injunction under CPLR § 6301. See, W.T. Grant Co. v. Srogi, 52 N.Y.2d 496 (1981).

Here, plaintiffs cannot demonstrate that they will suffer irreparable injury if the preliminary injunction is denied, since they will be permitted to fully litigate the issues raised herein in the Civil Court, which has been held to be the preferred forum in which to resolve landlord-tenant disputes. See, Post v. 120 East End Ave. Corp., 62 N.Y.2d 19 (1984); Cox v. J.D. Realty Associates, 217 A.D.2d 179 (1st Dep't 1995).

In the event that the lease is terminated and plaintiffs are unable to prevail in the ensuing summary proceeding in the Civil

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[1] Although plaintiffs have cited to one case, Stolz v. 111 Tenants Corp., 3 A.D.3d 421 (1st Dep't 2004) in which a *Yellowstone* injunction enjoining the defendant landlord from taking action to terminate a residential proprietary lease was found to be appropriate where the tenants exercised their right to remove a greenhouse themselves. However, that decision must be read to be limited to the unique circumstances presented therein, since the Court did not explicitly indicate an intent to modify or alter the well settled rule that the tenant must hold a commercial lease.

Court, plaintiffs will be afforded 10 days from the judgment of possession to cure the alleged violation. See, Thompson v. 490 West End Apartments Corp., 252 A.D.2d 430 (1st Dep't 1998), lv. to app. denied, 92 N.Y.2d 814 (1998); RPAPL § 753(4).[2]

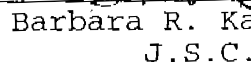
Accordingly, based on the papers submitted this Court finds that plaintiffs are not entitled to the injunctive relief sought.

Plaintiffs' motion is, therefore, denied in its entirety, and the temporary restraining order contained in the Order to Show Cause is hereby vacated.

This constitutes the decision and order of this Court.

FILED
MAR 28 2007
NEW YORK COUNTY CLERK'S OFFICE

Date: March 20, 2007



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

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[2] RPAPL § 753(4) provides, in relevant part, that "[i]n the event that [a summary] proceeding is based upon a claim that the tenant or lessee has breached a provision of the lease, the court shall grant a ten day stay of issuance of the warrant, during which time the [tenant] may correct such breach."