

**Alomari v Site Five Hous. Dev. Fund
Corp.**

2007 NY Slip Op 30837(U)

April 12, 2007

Supreme Court, New York County

Docket Number: 0603340/2006

Judge: Emily Jane Goodman

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

PRESENT: Goodman
Justice

PART 17

NASSER ABDO ALOMARI

- v -

SIDE FIVE HOUSING DEVELOPMENT FUND CORP

INDEX NO. 603340/82
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided for the defendant

FILED
APR 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/12/07

EMILY JANE GOODMAN

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 : I.A.S. PART 17

-----X
Nasser Abdo Alomari,

Plaintiff(s),
- against -

Site Five Housing Development Fund
Corporation,

Defendant(s).
-----X

Index No.603340/06

FILED

APR 20 2007

NEW YORK
COUNTY CLERK'S OFFICE

By Order to Show Cause, Plaintiff moves for a preliminary injunction against Defendant and its agents, seeking to prevent Defendant from terminating Plaintiff's commercial lease on the basis that Plaintiff stole electricity. Defendant argues that a Yellowstone injunction cannot be granted because it is inapplicable in cases where a plaintiff does not have the right to cure. Because the termination is based on nuisance, not breach of lease, Defendant argues that Plaintiff has no right to cure. Defendant also argues that the motion is untimely because Yellowstone relief must be requested prior to service of the termination notice, and prior to expiration of any cure period.

Plaintiff maintains that, pursuant to the lease, he is entitled to a fifteen day notice to cure for breach of lease, and cites several lease provisions regarding tenant's responsibility for payment of electricity, compliance with laws, and use of the premises. Plaintiff also maintains that the termination notice served is void for lack of specificity.

Discussion

A party who seeks a Yellowstone injunction must show 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 of vacating the premises.

Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc., 93 NY2d 508, 514 (1999) (citation and internal quotation marks omitted). A party must move for the injunction prior to the expiration of the period to cure. Prince Fashions, Inc. v 542 Holding Corp., 15 AD3d 214 (1st Dept 2005); Daashur Assoc. v December Artists Apt. Corp., 226 AD2d 114 (1st Dept 1996).

Yellowstone relief is inapplicable where a plaintiff does not have the right to cure, as the purpose of the injunction is to stay the running of the cure period to allow the lease to remain in effect until the underlying dispute is resolved. See John A. Reisenbach Charter School v Wolfson, 298 AD2d 224 (1st Dept 2002); Times Square Stores Corp. v Bernice Realty Co., 107 AD2d 677 (2d Dept 1985).

Because Defendant did not serve anything other than a termination notice, Plaintiff would not have known to move for injunctive relief prior to service of the termination notice. If Plaintiff was entitled to receive a notice to cure, prior to receipt of a termination notice, Defendant's contention that the motion was untimely is unpersuasive because Defendant cannot profit from its own failures. Thus, the issue here is whether Plaintiff was entitled to be served with a notice to cure, prior to receipt of the termination notice. Defendant cites Kast Realty

LLC v Houston (2003 NY Misc LEXIS 574 [App. Term, First Department 2003]), for the proposition that a notice to cure is not required where a holdover proceeding is based on nuisance, not breach of lease. Plaintiff maintains that the allegation of stealing electricity is more properly considered a breach of lease, not a nuisance, and therefore, he should have been served with a notice to cure, prior to receipt of a termination notice.

The Court need not decide whether a notice to cure was required here. As noted above, the purpose of a Yellowstone injunction is to toll any cure period until the rights of the parties have been determined, affording the tenant an opportunity to cure after receiving a determination on the issue. Here, because the landlord has taken the position that no notice to cure is required, there is no cure period to toll. If the landlord is correct in arguing that no notice to cure was required, then Yellowstone relief would be inappropriate. See John A. Reisenbach Charter School v Wolfson, 298 AD2d 224, supra; Times Square Stores Corp. v Bernice Realty Co., 107 AD2d 677, supra. However, if a notice to cure was in fact required, then the housing court proceeding which the landlord intends to commence would be dismissed for failure to serve a notice to cure. In the underlying action, Plaintiff asserts a cause of action for a declaratory judgment (for a declaration that he did not steal electricity) and for an injunction preventing termination of the lease. In the absence of any showing that the housing court is unable to afford complete relief, there is no

* 5]

basis for declaratory relief, especially because the housing court is the preferred venue to resolve such disputes. See Post v 120 East End Ave. Corp., 62 NY2d 19, 28 (1984); Cox v JD Realty Assoc., 217 AD2d 179, 180-81 (1st Dept 1995). A declaration that tenant did not steal electricity is unnecessary because that is the very issue which would be decided in any holdover. Further, Plaintiff can raise the claims asserted herein, as defenses to the holdover proceeding. The housing court can determine the issue of whether service of a notice to cure was required, and if so, dismiss any holdover proceeding based on the failure to serve that notice. See Waring Barker Co. v Santiago, NYLJ, Jan. 23, 1998, at 25, col 1 [App Term, 1st Dept] (landlord's failure to serve a notice to cure in a nuisance holdover was fatal where the lease provided for a notice to cure for breach of the lease for objectionable conduct); Unicorn 151 Corp. v Small, 181 Misc2d 304 (Civ Ct, Kings Co 1999) (holdover dismissed for failure to serve notice to cure where grounds for termination were more properly deemed a breach of lease, as opposed to a nuisance). Moreover, the housing court can also decide whether the termination notice is void for lack of specificity, and dismiss any holdover proceeding on that basis.

It is hereby

ORDERED that the motion is denied and the proceeding is dismissed without prejudice to Plaintiff raise any claims herein as defenses to a holdover proceeding; and without prejudice to Plaintiff raising any other claims, counterclaims and defenses in


housing court, and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the action, without costs and disbursements.

This Constitutes the Decision and Order of the Court.

Dated: April 12, 2007

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
APR 20 2007
NEW YORK
COUNTY CLERK'S OFFICE