

**Sedgwick Ave. Assoc., LLC v H&B Homerun, Inc.**

2010 NY Slip Op 31165(U)

April 28, 2010

Sup Ct, Nassau County

Docket Number: 462/10

Judge: Antonio I. Brandveen

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

SEDGWICK AVENUE ASSOCIATES, LLC.,

Plaintiff,

- against -

H&B HOMERUN, INC., JOHN LEESON and  
HENRY G. POLLMAN,

Defendants.

TRIAL / IAS PART 29  
NASSAU COUNTY

Index No. 462/10

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	<u>2</u>
Replying Affidavits .....	<u>3</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The defendant H&B Homerun, Inc. moves to temporarily restrain and enjoin any District Court Judge in the Landlord-Tenant Part, First District, of the Nassau County District Court, or any other Judge to whom this matter may be assigned or before whom this matter may appear, from conducting any further proceedings in connection with the matter captioned Sedgwich Avenue Associates LLC, a New York limited corporation 7-11 South Broadway, Suite 308, White Plains, New York 10601 against H&B Homerun, Inc. T/A Cherrywood Café, et ano., under Index number SP000119/10, and pursuant to CPLR 602 (a) removing the matter captioned Sedgwich Avenue Associates LLC, a New

York limited corporation 7-11 South Broadway, Suite 308, White Plains, New York 10601 against H&B Homerun, Inc. T/A Cherrywood Café, et ano., under Index number SP000119/10, presently pending in the Nassau County District Court to this Court, and transferring the same to this Court, to be consolidated with, and setting the matter down for joint trial with the instant matter, to wit Sedgwich Avenue Associates LLC against H&B Homerun, Inc., John Leeson and Henry G. Pollman, and granting a full rent abatement in favor of the defendant H&B Homerun, Inc. The plaintiff opposes this motion.

The general manager of Duffy's Wing House, owned and operated by H&B Homerun, Inc. states, in a February 1, 2010 affidavit, the issues raised in the answer, counterclaims and cross claims by H&B Homerun, Inc. in the plenary action here in the New York State Supreme Court in Nassau County bear directly upon the issue raised in the summary holdover proceeding in the Nassau County District Court. The general manager alleges circumstances involving the plaintiff and the defendant here, to wit the petitioner and respondent in the local Court where the plaintiff seeks possession of 1148 Wantagh Avenue, Wantagh, New York.

The defense counsel points, in a February 1, 2010 affirmation, to the February 1, 2010 to other supporting papers, including the affidavit by the general manager regarding the lease agreement which precludes counterclaims and cross claims by H&B Homerun, Inc. in the summary holdover proceeding in the Nassau County District Court. The

defense counsel contends notions of judicial economy and due process require these two lawsuits be combined for a joint trial because there are common questions of law and fact. The defense counsel maintains the Supreme may remove to itself an action pending in another Court, and consolidate it or have it tried together with an action in the Supreme Court. The defense counsel asserts consolidation and joint trial rests in the sound discretion of the Court. The defense counsel submits the defendant H&B Homerun, Inc. would be prejudiced if the two lawsuits are not heard together since the defendant H&B Homerun, Inc. has valid, provable defenses, counterclaims and cross claims which would otherwise not be heard unless the Court grants this motion. The defense counsel avers the defendant H&B Homerun, Inc. has met its burden to obtain a temporary restraining order, and the equities clearly weigh in favor of granting this motion where the defendant H&B Homerun, Inc.'s negligence in maintaining the sewage system at 1148 Wantagh Avenue, Wantagh, New York accrues damages to this defendant.

The plaintiff's attorney states, in a February 2, 2010 affirmation, the defense request for a temporary restraining order, to wit a "Yellowstone Injunction," is improper because the defendant H&B Homerun, Inc. has not met the requisite four prong test. The plaintiff's attorney notes the defendant H&B Homerun, Inc. has not shown the existence of a commercial lease. The plaintiff's attorney points to the October 2, 2009 order and decision of Nassau County Supreme Court Justice Randy Sue Marber which cancelled the lease agreement between the plaintiff and the defendant in H&B Homerun, Inc. against

Sedgwich Avenue Associates LLC, Index number 22654/2007. The plaintiff's attorney notes that decision was not appealed, and the time expired for an appeal. The plaintiff's attorney adds the plaintiff served H&B Homerun, Inc. with a 30 day notice of termination for the premises on November 24, 2009, so the month-to-month tenancy between these parties ended on December 31, 2009, well before the instant defense motion brought by a February 2, 2010 order to show cause. The plaintiff's attorney asserts the defendant H&B Homerun, Inc. fails to show the application for the issuance of an injunction was made prior to the lease termination. The plaintiff's attorney argues lease cannot be reinstated by the Court after the lapse of time specified to cure the default. The plaintiff's attorney points out the ability and desire of the defendant H&B Homerun, Inc. to cure the alleged default by any means short of vacating the premises. The plaintiff's attorney submits the defendant H&B Homerun, Inc. does have the ability to cure the 30 day notice of termination for the premises.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion.

The Second Department holds:

A tenant seeking Yellowstone relief must demonstrate that (1) it holds a commercial lease, (2) it has received a notice of default, notice to cure, or threat of termination of the lease, (3) the application for a temporary restraining order was made prior to expiration of the cure period and termination of the lease, and (4) it has the desire and ability to cure the alleged default by any means short of vacating the premises (*see, First Natl. Stores v. Yellowstone Shopping Ctr.*, 21 N.Y.2d 630, 290 N.Y.S.2d 721, 237 N.E.2d 868; *Mayfair Super Mkts. v. Serota*, 262 A.D.2d 461, 692

N.Y.S.2d 415)

***King Party Center of Pitkin Ave., Inc. v. Minco Realty, LLC***, 286 A.D.2d 373, 374, 729 N.Y.S.2d 183 [2<sup>nd</sup> Dept., 2001].

The Second Departments states:

“The 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 on the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold” (***Hopp v Raimondi***, 51 AD3d 726, 727 [2008]; see ***Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.***, 93 NY2d 508, 514 [1999])

***Korova Milk Bar of White Plains, Inc. v. PRE Properties, LLC***, 70 A.D.3d 646, 647, 894 N.Y.S.2d 499 [2<sup>nd</sup> Dept., 2010].

Where a tenant fails to make a timely request for a temporary restraining order, a court is divested of its power to grant a Yellowstone injunction (see ***Long Is. Gynecological Servs. v 1103 Stewart Ave. Assoc. Ltd. Partnership***, 224 AD2d at 593). Here, the Supreme Court properly denied the plaintiff’s motion for a Yellowstone injunction. Contrary to the plaintiff’s contention, its motion for Yellowstone relief was untimely since it commenced the action after the defendant properly served a notice to cure, the cure period expired, and the lease was terminated pursuant to a validly served notice of termination (see ***King Party Ctr. of Pitkin Ave., Inc. v Minco Realty***, 286 AD2d at 375)

***Korova Milk Bar of White Plains, Inc. v. PRE Properties, LLC***, 70 A.D.3d, supra, at 648.

This Court is constrained, as a matter of law, to deny the request of the defendant H&B Homerun, Inc. for a temporary restraining order or any injunctive relief. The defendant H&B Homerun, Inc. has not met the prerequisite *Yellowstone* tests, to wit H&B Homerun, Inc. holds a commercial lease, (2) this order to show cause for a temporary restraining order was made prior to expiration of the cure period and termination of the lease, and (3) H&B Homerun, Inc. has the ability to cure the alleged default by any means

short of vacating the premises.

CPLR 602 (b) provides:

Where an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court. Where an action is pending in the county court, it may, upon motion, remove to itself an action pending in a city, municipal, district or justice court in the county and consolidate it or have it tried together with that in the county court.

The Second Department holds:

The ordering of the consolidation or a joint trial of several actions is a discretionary one (*see* CPLR 602, subd. [a]). While this discretion is wide, the present trend favors granting consolidation or a joint trial (2 Weinstein-Korn-Miller, NY Civ.Prac, pars 602.01, 602.03; *see* Williams v. Mascitti, 71 A.D.2d 813, 419 N.Y.S.2d 404; *Inspiration Enterprises v. Inland Credit Corp.*, 54 A.D.2d 839, 388 N.Y.S.2d 578, *app. dsmd.* 41 N.Y.2d 901; *Maigur v. Saratogian Inc.*, 47 A.D.2d 982, 367 N.Y.S.2d 114) *Mideal Homes Corp. v. L & C Concrete Work, Inc.*, 90 A.D.2d 789, 455 N.Y.S.2d 394 [2<sup>nd</sup> Dept., 1982].

Here, the plaintiff submits the February 2, 2010 affirmation by counsel exclusively in opposition to the defendant's request for a temporary restraining order enjoining the any District Court Judge in the Landlord-Tenant Part, First District, of the Nassau County District Court, or any other Judge to whom this matter may be assigned or before whom this matter may appear, from conducting any further proceedings in connection with the matter captioned Sedgwich Avenue Associates LLC, a New York limited corporation 7-11 South Broadway, Suite 308, White Plains, New York 10601 against H&B Homerun, Inc. T/A Cherrywood Café, et ano., under Index number SP000119/10. However, the summary proceeding in the local Court involves a dissimilar legal issue, to wit the

possession of 1148 Wantagh Avenue, Wantagh, New York while the plenary action here involves monetary damages for rent and services. The defendant H&B Homerun, Inc. fails to show common questions of law *and* fact, so the movant has not met its burden on this branch of the motion, and it must be denied.

Accordingly, the motion is denied in all respects.

So ordered.

Dated: April 28, 2010

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

**ENTERED**  
MAY 03 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE