

Herz v Militello

2013 NY Slip Op 33628(U)

November 26, 2013

Sup Ct, Kings County

Docket Number: 504491/2013

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 504491/2013
Motion Date: 11-18-13
Motion Cal. No.: 1

-----x

ESTHER HERZ,

SED # 001

Plaintiff,

DECISION/ORDER

-against-

ANGELA MILITELLO,

Defendant,

-----x

The following papers numbered 1 to 4 were read on this motion:

Papers:	Numbered
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits.....	1
Answering Affirmations/Affidavits/Exhibits.....	2,
Reply Affirmations/Affidavits/Exhibits.....(Sur Reply).....	3,4
Other.....	

Upon the foregoing papers the motion is decided as follows:

Plaintiff Esther Herz, moves by order to show cause for a Yellowstone injunction (a) staying and tolling the running of a five day rent demand dated June 27, 2013; (b) staying any termination of plaintiff's tenancy pending the outcome of this action; (c) preliminarily enjoining defendant from serving any further alleged notices seeking to terminate plaintiff's tenancy pending the outcome of this action; (d) staying defendant's summary proceeding which is presently pending in the Civil Court of the City of New York, County of Kings; and (e) enjoining defendant from taking any other action to evict plaintiff from the subject premises pending the determination of this action for a declaratory judgment. Plaintiff also seeks a preliminary injunction enjoining defendant Angela Militello to repair various conditions of the subject premises which plaintiff claims are dangerous and hazardous.

The plaintiff is a tenant under a commercial lease concerning real property located at 1977 Coney Island Avenue, Brooklyn, New York. The lease is for a five year term commencing

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on March 15, 2013. The defendant is landlord. Plaintiff leased the property intending to open a bridal store. The defendant commenced a commercial nonpayment proceeding against the plaintiff in the Civil Court of the County of Kings in which she seeks a judgment of possession and a warrant of eviction. The alleged predicate for the nonpayment proceeding is plaintiff's failure to pay rental arrears in response to a five day rent demand that was served on July 10, 2013.

Plaintiff commenced this action seeking various relief including a declaration that the plaintiff is entitled to withhold rent until various hazardous and dangerous conditions in the leased premises are abated. Specifically, plaintiff claims that there presently exists a mold condition at the premises and various deficiencies in the electrical systems which have prevented her from opening her store. Plaintiff also seeks an injunction directing defendant to repair these hazardous and dangerous conditions and enjoining the defendant from attempting to terminate her tenancy before the alleged conditions are remedied.

The Court will first address plaintiff's request for a *Yellowstone* injunction. The purpose of a *Yellowstone* injunction is to enable a tenant confronted by a notice of default, a notice to cure, or 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 (*see, Post v. 120 East End Ave. Corp.*, 62 N.Y.2d 19, 24–25, 475 N.Y.S.2d 821, 464 N.E.2d 125; *Heavy Cream, Inc. v. Kurtz*, 146 A.D.2d 672, 537 N.Y.S.2d 183 [1989]; *Hollymount Corp. v. Modern Business Assocs.*, 140 A.D.2d 410, 528 N.Y.S.2d 113). There is no need for such injunctive relief in this case, however, as the rent demand served by the defendant-landlord was the statutory prerequisite to a summary nonpayment proceeding, rather than a notice of default and a notice to cure the default within a specified period (*see, Top-All Varieties, Inc. v. Raj Development Co.*, 151 A.D.2d 470, 471, 542 N.Y.S.2d 259, 260 - 261; RPAPL 711[2]; *Sal De Enters. v. Stobar Realty*, 143 A.D.2d 180, 531 N.Y.S.2d 628; *Parksouth Dental Group v. East Riv. Realty*, 122 A.D.2d 708, 505 N.Y.S.2d 633). The summary proceeding pending in Civil Court is a rent nonpayment proceeding, and such proceedings are separate from a holdover summary proceedings and carry their own distinct cure provisions, obviating the need for *Yellowstone* relief (*see, Top-All Varieties, Inc.*, 151 A.D.2d 470, 471 *supra.*; *Hollymount Corp. v. Modern Business Assocs.*, 140 A.D.2d 410, 528 N.Y.S.2d 113, *supra.*; *Parksouth Dental Group v. East Riv. Realty*, 122 A.D.2d 708, 505 N.Y.S.2d 633, *supra.*).

Moreover, it is well settled that “courts cannot reinstate a lease after the lapse of time specified to cure a default” (*Goldstein v. Kohl's*, 16 A.D.3d 622, 623, 792 N.Y.S.2d 182). For this reason, an application for *Yellowstone* relief must be made not only before the termination of the subject lease . . . but must also be made prior to the expiration of the cure period set forth in the . . . landlord's notice to cure (*see Xiotis Rest. Corp. v. LSS Leasing Ltd. Liab. Co.*, 50 A.D.3d 678, 679, 855 N.Y.S.2d 578; *Hempstead Video, Inc. v. 363 Rockaway Assoc., LLP*, 38 A.D.3d 838, 833 N.Y.S.2d 144; *Gihon, LLC v. 501 Second Street, LLC*, 306 A.D.2d 376, 761 N.Y.S.2d 276; *King Party Ctr. of Pitkin Ave. v. Minco Realty*, 286 A.D.2d 373, 374, 729 N.Y.S.2d 183; *Mayfair Super Markets v. Serota*, 262 A.D.2d 461, 692 N.Y.S.2d 415; *Terosal Props. v. Bellino*, 257 A.D.2d 568, 683 N.Y.S.2d 581). Even if the Court were to treat the five

day rent demand as a notice to cure, since the plaintiff did not request a Yellowstone injunction within the five day period following service of the rent demand, she is not entitled to the injunction.

Finally, one of the critical issues in this proceeding is who is responsible to repair the dangerous and hazardous conditions that the plaintiff claims presently exist in the premises. Even if the court were to conclude that defendant has the responsibility to make the repairs, such a finding would not entitle the plaintiff to a stay of the summary proceeding pending in Civil Court. In the absence of a clear intention to the contrary, a commercial tenant's obligation to pay rent is independent of the landlord's obligation to make repairs or provide essential services (*see e.g. Thomson–Houston Elec. Co. of N.Y. v. Durant Land Improvement Co.*, 144 N.Y. 34, 44, 39 N.E. 7 [1894]; *Westchester County Indus. Dev. Agency v. Morris Indus. Bldrs.*, 278 A.D.2d 232, 717 N.Y.S.2d 279 [2000]; 2 Dolan, *Rasch's Landlord and Tenant–Summary Proceedings* § 18:31 [4th ed]). Plaintiff does not allege that the parties had intended to the contrary, and so, plaintiff's duty to pay rent continued despite landlord's alleged breaches of the lease (*see e.g. 91 East Main Street Realty Corp. v. Angelic Creations by Lucia*, 24 Misc.3d 25, 27, 884 N.Y.S.2d 565, 566; *Barile v. Cartwright Tents & Party Rentals, Inc.*, 4 Misc.3d 134(A), 2004 N.Y. Slip Op. 50762[U], 2004 WL 1587558 [App. Term, 9th & 10th Jud. Dists. 2004]).

For the above reasons, plaintiff's request for a Yellowstone injunction as well as plaintiff's request for a stay of the summary proceeding is **DENIED**.

Turning to plaintiff's motion insofar as it seeks a preliminary injunction enjoining the defendant to repair the various alleged dangerous and hazardous conditions, it is well settled that the decision to grant or deny a preliminary injunction rests in the sound discretion of the Court (*see Cooper v. Board of White Sands Condominium*, 89 A.D.3d 669, 669, 931 N.Y.S.2d 696; *Tatum v. Newell Funding, LLC*, 63 A.D.3d 911, 880 N.Y.S.2d 542). To establish the right to a preliminary injunction, the plaintiff must prove by clear and convincing evidence (1) the likelihood of ultimate success on the merits, (2) irreparable injury absent the grant of the injunction, and (3) a balance of the equities in the plaintiff's favor (*see CPLR 6301; Ginsburg v. Ock–A–Bock Community Assn., Inc.*, 34 A.D.3d 637, 637, 825 N.Y.S.2d 119; *Koursiaris v. Astoria N. Dev.*, 143 A.D.2d 639, 641, 532 N.Y.S.2d 916). Here, the plaintiff failed to meet his burden. Significantly, pursuant to paragraph 31 of the lease, the plaintiff represented that she examined and inspected the premises and that she was agreeing to accept possession of the premises "AS IS." Moreover, pursuant to paragraphs 2 and 35, the plaintiff assumed responsibility for the care and maintenance of the leased premises and agreed to make all repairs, including to the electrical fixtures.

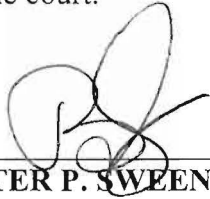
The court has considered the remaining arguments of the plaintiff and find them to be without merit.

Accordingly, it is hereby

ORDERED that plaintiff's motion is in all respects **DENIED**.

This constitutes the decision and order of the court.

Dated: November 26, 2013



PETER P. SWEENEY, A.J.S.C.

HON. PETER P. SWEENEY, J.S.C.

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