SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 42

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EUGENE WISOFF and JOAN MAZZELLE SYKES WISOFF,

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 150789/2014

170-176 WEST 89TH STREET APARTMENT CORP.,

Defendants

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NANCY M. BANNON, J.

In this action for, *inter alia*, a judgment declaring the parties' rights and obligations under a proprietary lease, the plaintiffs move, pursuant to First National Stores, Inc. v Yellowstone Shopping Center, Inc., 21 NY2d 630 (1968), to toll the amount of time allowed for the plaintiffs to cure the allegations set forth in the defendant's January 29, 2014 notice of default. In the alternative, the plaintiffs move for a preliminary injunction restraining the defendant from, *inter alia*, seeking to terminate the plaintiffs' proprietary lease or shares of stock and preserving the status quo. For the reasons set forth below, the plaintiffs' motion is granted.

The defendant is the owner of a residential cooperative building located at 170 West 89th Street, New York, NY. The plaintiffs entered into a contract of sale for the purchase of the subject cooperative unit in the building on November 1, 1989. Shortly thereafter, the plaintiffs installed a second bathroom within the unit. The parties dispute whether approval from the Cooperative Board was sought and granted. On or about May 22, 2013, the defendant notified the plaintiffs, *inter alia*, that the second bathroom was improperly installed without Board approval and that the plaintiffs had improperly installed a second kitchen. The Board subsequently hired an architect and conducted a physical inspection of the unit to determine whether the plaintiffs had created an illegal second apartment. On November 14, 2013, the defendant issued a notice of default to the plaintiffs alleging that the plaintiffs illegally expanded their apartment by annexing a

portion of the common area and incorporating it into the subject unit and that the plaintiffs created an illegal second apartment occupied by a tenant. The plaintiffs were given 30 days to remove the tenant and restore the apartment to its original size and configuration.

The plaintiffs commenced this action on January 28, 2014, by summons and verified complaint. The next day, on January 29, 2014, the defendant issued a "Thirty (30) Day Notice to Cure Default," alleging that the plaintiffs violated provisions of both the proprietary lease and the defendant's house rules. The defendant alleged that the plaintiffs made unauthorized alterations and created an additional and illegal apartment adjacent to their own, which they rent out to a tenant in violation of law and the terms of the proprietary lease. Additionally, the defendant alleged that the plaintiffs constructed a bathroom without the proper Department of Buildings filings, stored their property in common areas thereby obstructing certain hallways, and allowed their dogs to roam and defecate in common areas and the rear yard of the building. The plaintiffs were afforded until March 6, 2014 to cure their alleged default.

The plaintiffs filed an amended complaint on February 27, 2014, alleging seven causes of action seeking declaratory and injunctive relief. Specifically, the plaintiffs seek, *inter alia*, a judgment declaring that the unit "encompass[es] the entire perimeters as it currently exists in size" and that the defendant does not have a right to the portion of the unit it claims is "common area." Issue was joined by the defendant's answer dated March 28, 2014.

The plaintiffs applied, by order to show cause dated March 5, 2014, for an injunction pursuant to First National Stores, Inc. v Yellowstone Shopping Center, Inc., 21 NY2d 630 (1968), to toll the time allowed to cure the default as set forth in the Board's January 29, 2014 notice. Alternatively, the plaintiffs seek a preliminary injunction, enjoining the defendant from taking any action to terminate the plaintiffs' proprietary lease or shares of stock and from interfering with their rights to the premises.

The plaintiffs argue that a Yellowstone injunction should issue because the cure period had not expired and the plaintiffs "provided a meritorious claim with the express statement that if a cure is required it will cure the alleged defaults." The plaintiffs argue that they are entitled to a preliminary injunction because they have shown a likelihood

of success on the merits in that they submitted documentary evidence and several affidavits from individuals with first hand knowledge of the addition of the second bathroom and the configuration of the unit over time, they will otherwise suffer the irreparable harm of being evicted, and the equities balance in their favor so as to maintain the status quo.

In opposition, the defendant argues that neither a Yellowstone injunction or a preliminary injunction is necessary because a ten day cure period is already available to the plaintiffs under RPAPL § 753(4). The defendant further argues that the plaintiffs are unable to establish irreparable harm or a likelihood of success on the merits such as would warrant a preliminary injunction.

The purpose of a Yellowstone injunction is to stop the running of the cure period of a tenant's alleged default, thereby protecting the tenant's investment in the leasehold and preserving the status quo until the parties' rights can be adjudicated. See Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc., 93 NY2d 508, 514 (1999). The applicant for a Yellowstone injunction must establish 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 at 514 quoting 225 E. 36th Street Garage Corp. v 221 E. 36th Owners Corp., 211 AD2d 420, 421 (1st Dept. 1995). Yellowstone relief has been granted to residential tenants only in certain narrow circumstances, for instance when the ten-day cure period provided by RPAPL § 753(4) is either unavailable or insufficient. See e.g. Hopp v Raimondi, 51 AD3d 726 (2d Dept. 2008); Stoltz v 111 Tenants Corp., 3 AD3d 421 (1st Dept. 2004); Seligmann v Parcel One Co., 170 AD2d 344 (1st Dept. 1991). Due to a clearly identifiable equity interest, courts have also issued Yellowstone injunctions where the tenant owns shares in a cooperative apartment in order to avoid "forfeiture of [the tenant's] valuable leasehold interest while it challenges the propriety of the landlord's default notice." Marathon Outdoor v Patent Construction Systems Division of Harsco Corp., 306 AD2d 254, 255 (2d Dept. 2003); see e.g. Hopp v Raimondi, 51 AD3d 726; Wilen v Harridge House Assoc., 94 AD2d 123 (1st Dept. 1983); Runes v Douglas Elliman-Gibbons & Ives, 83 AD2d 805 (1st Dept. 1981); see also Heavy Cream v Kurtz, 146 AD2d 672 (2d Dept. 1989).

Although RPAPL § 753(4) displaces injunctions pursuant to Yellowstone for residential tenants within the City of New York after adjudication of the merits in proceedings to recover possession of premises, RPAPL § 753(4) does not limit Yellowstone where, as here, an action seeking a judgment declaring the parties' rights and obligations under a proprietary lease remains pending. See Post v 120 East End Ave. Corp., 62 NY2d 19, 26 (1984); Lombard v Station Square Inn Apartments Corp., 94 AD3d 717, 720-721 (2d Dept. 2012). RPAPL § 753(4) applies only to proceedings to recover possession of residential premises in New York City based upon a tenant's alleged breach of a provision of the lease. See RPAPL § 753(4); Lombard v Station Square Inn Apartments Corp., 94 AD3d at 720-721. Once the court adjudicates the merits of the case, RPAPL § 753(4) provides for a ten-day stay of issuance of a warrant of eviction to allow the tenant to cure the breach. See Post v 120 East End Ave. Corp., 62 NY2d at 26. RPAPL § 753(4), therefore, provides for a cure period after the court has determined that the subject lease has terminated due to the tenant's breach. See Post v 120 East End Ave. Corp., 62 NY2d at 27. In contrast, Yellowstone "prevents expiration of the lease by tolling the running of the cure period, a necessary precondition to terminating the lease." Post v 120 East End Ave. Corp., 62 NY2d at 26. Here, the defendant landlord has not commenced a proceeding to recover possession of the premises, the merits have not been adjudicated, and the subject lease has not terminated due to the plaintiff tenant's breach. Accordingly, RPAPL § 753(4) is inapplicable to the circumstances of this case.

The plaintiffs are owners of shares in the subject cooperative unit in the building owned by the defendant. The January 29, 2014 notice of default afforded the plaintiffs until March 6, 2014 to cure their alleged default. The plaintiffs applied for injunctive relief pursuant to Yellowstone on March 5, 2014, one day before the cure period expired and maintain their willingness and ability to cure any default. Due to the clear threat of termination of their proprietary lease and forfeiture of their cooperative shares, the timeliness of the plaintiffs' application, and their desire to cure any breach, the plaintiff's application for an injunction pursuant to Yellowstone is granted on the condition that the plaintiffs continue to tender monthly maintenance in the amount reserved in the proprietary lease throughout the pendency of these proceedings.

In light of the foregoing, the parties' contentions concerning the issuance of a preliminary injunction have been rendered academic. See Wisholek v Douglas, 97 NY2d 740 (2002).

Accordingly, it is

ORDERED that the plaintiffs' motion for a Yellowstone injunction is granted and, pending adjudication of this matter, the defendant is hereby enjoined and restrained from terminating or cancelling the plaintiff's proprietary lease and the plaintiffs' time to cure any alleged defaults under the lease is hereby tolled, on the condition that the plaintiffs make timely and full payments of all maintenance charges in the amount reserved in the proprietary lease during the pendency of this action, and it is further

ORDERED that the plaintiff's motion for a preliminary injunction is denied as moot, and it is further

ORDERED that the counsel are directed to appear for a preliminary conference in Room 1127 B on November 13, 2014, at 9:30am, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: October 21, 2014

, JSC

HON. NANCY M. BANNON

J.S.C.