

Estate of Klein v 400 E. 85th St. Realty Corp.
2018 NY Slip Op 31605(U)
July 12, 2018
Supreme Court, New York County
Docket Number: 160174/2017
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED

PART

IAS MOTION 2

Justice

-----X

INDEX NO.

160174/2017

ESTATE OF ARTHUR KLEIN and MARC POLLACK,

Plaintiffs,

MOTION SEQ. NO.

001

- v -

400 EAST 85TH STREET REALTY CORP.,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for

INJUNCTION/RESTRAINING ORDER

Upon the foregoing documents, it is ordered that the motion is decided as set forth below.

In this action seeking declaratory and injunctive relief, plaintiffs Estate of Arthur Klein (“the Estate”) and Marc Pollack (“Pollack”) (collectively “plaintiffs”) move: 1) pursuant to CPLR 6301, granting a preliminary injunction enjoining defendant 400 East 85th Street Realty Corp. or anyone acting on its behalf from terminating plaintiffs’ lease or tenancy in the residential cooperative at 400 East 85th Street, Unit 11H, New York, New York (“the unit”), or from instituting an action or summary proceeding to recover possession of said apartment during the pendency of this action through a final adjudication on the merits of this action, or in the alternative; 2) granting plaintiffs a “Yellowstone” injunction tolling the expiration of the cure period in defendant’s Notice to Cure dated October 3, 2017, and further enjoining defendant, and any person acting on its behalf, from terminating plaintiff’s lease and tenancy in the unit, or from instituting an action or summary proceeding to recover possession of said unit during the

pendency of this action through a final adjudication of the merits; and 3) for such other and further relief as this Court deems just and proper. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from a dispute over whether Pollack and/or his family can reside in the unit, which was in a residential cooperative in Manhattan. The Estate is the proprietary lessee and sole shareholder of the unit. Klein, who purchased the shares in the unit in 1981, passed away in 2014. Defendant is the cooperative's board of directors.

From 1982 through 2011, Klein's two daughters alternated living in the unit. Klein never resided there. In 2011, Klein suggested that Pollack, his grandson, reside in the unit. Pollack spent approximately \$100,000 renovating the unit in 2012 and moved in during May 2013. When Pollack moved in, he was advised by defendant that his occupancy was a sublet which required defendant's written consent pursuant to paragraph 14 of the proprietary lease. That paragraph provided that:

14. [Klein] shall not, without the written consent of [defendant] on such conditions as [defendant] may prescribe, occupy or use the [unit] or permit the same or any part thereof to be occupied or used for any purpose other than as a private dwelling and for such professional use as is permitted by law for [Klein and his] spouse, their children, grandchildren, parents, grandparents, brothers and sisters and domestic employees, and in no event shall more than one couple occupy the [unit] without the written consent of [defendant]. In addition to the foregoing, the [unit] may be occupied from time to time by guests of [Klein].

Klein and Pollack agreed to defendant's demand for a one year written approval of Pollack's occupancy of the unit, which was to last through June of 2014. During the approval process, Pollack disclosed extensive financial information. In 2014, Klein and Pollack agreed to

defendant's renewed demand for annual renewal of the sublet of the unit. After Klein's death in 2014, the Estate became the proprietary lessee of the unit. Pollack continued to live in the unit with the written consent of defendant, granted annually. In or about May 2017, Pollack married Cindy Tortora, who also occupied the unit with the consent of defendant. At the expiration of Pollack's most recent annual sublet, defendant advised Pollack and Tortora that it no longer wished to renew its consent to his residence in the unit.

On or about October 3, 2017, defendant served Pollack with a notice to cure claiming plaintiffs were in breach of the proprietary lease because the sublet of the unit expired on June 14, 2017 and they failed to obtain written consent to remain in the unit after that date. Defendant gave the Estate until November 15, 2017 to cure the default by removing Pollack and Tortora from the unit and warned that, if no such cure occurred, it would terminate the tenancy.

On November 14, 2017, plaintiffs commenced the instant action seeking, inter alia, a declaration, pursuant paragraph 14 of the proprietary lease, that Pollack's residency in the unit, as well as the residency by Tortora and Pollack's children, grandchildren, parents, grandparents, brothers and sisters did not require the written consent of defendant. Plaintiffs also sought an injunction, pursuant to *First National Stores, Inc. v Yellowstone Shopping Center, Inc.*, 21 NY2d 630 (1968), preventing defendant from terminating the proprietary lease or allowing plaintiffs to cure any violation thereof.

On November 15, 2017, plaintiffs filed the instant order to show cause seeking the relief described above.

LEGAL CONCLUSIONS

Preliminary Injunction

“A preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party.” 1234 *Broadway LLC v West Side SRO Law Project*, 86 AD3d 18, 23 (1st Dept 2011). Whether to grant a preliminary injunction is a matter to be determined in the broad discretion of the court. *See Madden Int’l, Ltd. v Lew Footwear Holdings Pty Ltd.*, 143 AD3d 418 (1st Dept 2016); *Cityfront Hotel Assoc. Ltd. Partnership v Starwood Hotels & Resorts Worldwide, Inc.*, 142 AD3d 873 (1st Dept 2016).

Plaintiffs assert that there is a substantial likelihood that they will prevail on the merits, since paragraph 14 of the proprietary lease permits Pollack, the grandson of the deceased lessee, Klein, to reside in the unit. However, language identical to that in paragraph 14 has been construed to permit occupancy by the listed persons other than the lessee, such as grandchildren, only if the lessee maintains a concurrent occupancy. *See 445/86 Owners Corp. v Haydon*, 300 AD2d 87 (1st Dept 2002). Here, since Pollack and Tortora cannot maintain a concurrent occupancy with the lessee, Klein, who is deceased, plaintiffs have failed to establish a substantial likelihood of success on the merits.

Nor have plaintiffs established that the equities weigh in their favor. Pollack has lived in the unit since 2013 and, since that time, he obtained written approval for his occupancy therein on an annual basis. He thus cannot now assert that such written consent is not required.

Given the foregoing factors, plaintiffs are not entitled to a preliminary injunction. Thus, this Court need not address whether plaintiffs would suffer irreparable harm if they were not

granted such relief. In any event, as discussed below, plaintiffs are entitled to a *Yellowstone* injunction.

Yellowstone Injunction

Alternatively to seeking a preliminary injunction, plaintiffs move, pursuant to *First National Stores, Inc. v Yellowstone Shopping Center, Inc.*, *supra*, to toll the time period in which plaintiffs may rectify the alleged violation of the proprietary lease set forth in defendant's notice to cure.

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. Assocs.*, 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. Assocs.*, 93 NY2d 508 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); *Stolz 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. Hodd 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).

Wisoff v 170-176 W. 89th St. Apt., Corp., 2014 NY Slip Op 32773(U) (Sup Ct, NY County 2014).

Here, plaintiffs clearly received a notice to cure from defendant. The notice to cure stated that, if plaintiffs failed to cure, defendant would elect to terminate the lease on November 15, 2017. Since plaintiffs filed the instant motion on the last allowable cure date, they requested injunctive relief prior to the termination the lease. *See Zhu v Grand Golden Door, LLC*, 2013 NY Slip Op 33318(U) (Sup Ct New York County 2013) (*Yellowstone* motion timely where filed on last day of cure period). Further, plaintiffs represent that, if it is determined that Pollack's occupancy of the unit violates the proprietary lease, then the Estate can cure the alleged breach by having Pollack and Tortora vacate the unit. Thus, the Estate, the lessee of the unit, can cure the alleged default without vacating the premises.

Given the possible termination of the Estate's proprietary lease and forfeiture of its shares in the cooperative, the timeliness of the plaintiffs' application, and plaintiffs' ability to cure the alleged breach, plaintiffs' application for a *Yellowstone* injunction is granted on the condition that, during the pendency of these proceedings, plaintiffs continue to tender monthly rental payments to defendant in the amount of \$1,200. *See Wisoff, supra*.¹

Defendant argues that plaintiffs are not entitled to injunctive relief because a ten-day cure period is available to them pursuant to RPAPL § 753(4). However, its contention is without merit.

¹ By so-ordered stipulation dated November 15, 2017, plaintiffs were directed to pay defendant "use and occupancy *pendente lite* commencing October 1, 2017. NYSCEF Doc. No. 11. The most recent sublease for the unit reflected that Pollack was paying monthly rent in the amount of \$1,200. NYSCEF Doc. 18.

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.

Wisoff, supra.

Defendant further demands that, if a *Yellowstone* injunction is granted, plaintiffs must post an undertaking. While a court, in its discretion, may require the posting of an undertaking in connection with the granting of a *Yellowstone* injunction (*1286 R.R. Operating, Inc. v McAlpin Assoc.*, 169 AD2d 450 [1st Dept 1991]), defendant has set forth no authority requiring that such an undertaking be posted. Nor has defendant submitted any reasons why the facts of this case warrant such an undertaking. Indeed, defendant is adequately protected by the value of the improvements made by Pollack before he moved into the unit. *See Kuo Po Trading Co. v Tsung Tsin Ass'n.*, 273 AD2d 111 (1st Dept 2000). Finally, this court notes that all of the cases relied on by defendant in support of its argument involve commercial, and not residential, leases.

In light of the foregoing, it is hereby:

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 plaintiffs' proprietary lease and the plaintiffs' time to cure any alleged defaults under the lease is hereby tolled, on the condition that, during the pendency of this action, the plaintiffs make rental payments to defendant in the amount of \$1,200; and it is further

ORDERED that the plaintiffs' motion is otherwise denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference at 80 Centre Street, Room 280, on September 25, 2018, at 2:15 p.m.; and it is further

ORDERED that plaintiffs' counsel is to serve a copy of this order, with notice of entry, on counsel for defendant within 20 days after this order is posted to NYSCEF; and it is further

ORDERED that this constitutes the decision and order of the court.

7/12/2018
DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED
GRANTED
SETTLE ORDER

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DENIED

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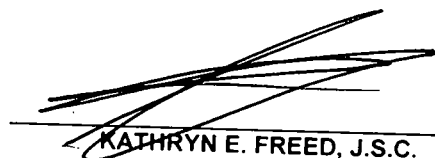
NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

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OTHER

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REFERENCE


KATHRYN E. FREED, J.S.C.