SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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MARK J. ALONSO and MARYANN SERRALLES ALONSO,

Plaintiffs,

- v -

401 EAST 74 OWNERS CORP.,

Defendant.

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INDEX NO. 158349/2018

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 56, 57, 59, 61, 62, 63, 64, 65

were read on this motion for preliminary injunction.

By order to show cause, plaintiffs seek a *Yellowstone* injunction based on a notice to cure by which defendant alleges certain defaults. Plaintiffs also seek an order permitting them to amend their complaint.

I. RELEVANT BACKGROUND

In 1995, plaintiffs purchased shares in defendant cooperative apartment corporation allocated to apartment 12D at 401 East 74th Street, New York, New York, and in 2001, plaintiff purchased shares allocated to apartment 12C. (NYSCEF 25). At the time of plaintiffs' purchase of apartment 12C, the parties entered into a proprietary lease for the two units. (NYSCEF 24).

By letter dated September 9, 2010, defendant informed all residents of the building that no new washing machines or dryers may be installed, and that existing washing machines and dryers may be repaired, but not replaced, and must be removed when the apartment is vacated. (NYSCEF 26).

By letter dated August 21, 2018, defendant informed plaintiffs that it was aware that they

had a washing machine in their apartment, and as it was not on the list of "grandfathered units," they were required to remove the washing machine within 30 days. (NYSCEF 37).

On September 9, 2018, plaintiffs filed an order to show cause and summons and complaint seeking a *Yellowstone* injunction, along with a judgment declaring that they are not in default of the lease, and attorney fees. (NYSCEF 2, 41). On September 11, 2018, plaintiffs withdrew their order to show cause on the parties' stipulation that defendant's August 2018 letter did not constitute a "formal notice to cure" or "any other formal predicate notice" (NYSCEF 14, 15).

On November 8, 2018, defendant served plaintiffs with a 30-day notice to cure the following:

> (a) Restoration of the fire proof integrity of the building's exhaust stack, leading to the bathroom, providing a three-hour fire-rating for the exhaust stack and (b) restoration of the fire proof integrity of the interior bathroom wall, providing a two-hour fire rating. By a licensed and insured plumber, removal of the washing machine, proper disposal of the washing machine, removal of the hot and cold-water lines, bringing the lines back to the source, removing and properly capping the drain connection. Removal, by a licensed and insured electrician, of the service outlet from the closet.

(NYSCEF 45). Defendant filed its answer, including a counterclaim, on November 21, 2018. (NYSCEF 44).

In addition to seeking the *Yellowstone* injunction and leave to amend their complaint, plaintiffs also seek an extension of time to reply to defendant's counterclaim. (NYSCEF 47).

II. *YELLOWSTONE* INJUNCTION

A. Contentions

1. Plaintiffs

Plaintiffs contend in their memorandum of law that they are entitled to a *Yellowstone* injunction because they hold a lease with defendant, received a notice to cure, applied for an

injunction before termination of the lease, and have a desire and ability to cure the alleged default. (NYSCEF 46).

By affidavit, plaintiff Mark Alonso states that the washing machine is a grandfathered appliance. He observes that in its notice to cure, defendant instead states that the washing machine is not on its list of grandfathered units. That the washing machine is not on defendant's list, he maintains, is attributable solely to defendant, not plaintiffs, and he observes that defendant's agents had inspected plaintiffs' residence on numerous occasions since the installation of the unit, and did not advise that the washing machine was not registered with defendant. He thus denies an obligation to remove the washing machine or any of the connections to it, perform remedial work on the ventilation system, or "perform unnecessary and vaguely-specified work under an impossible timetable." (NYSCEF 23).

2. Defendant

Defendant argues that plaintiffs are not entitled to *Yellowstone* relief because they have failed to evince a desire to cure the defaults by any means short of vacating the premises. It observes that in his affidavit, plaintiff states that he is not obligated to cure any of the defects listed in the notice to cure, and thereby fails to state that he is willing to cure. Defendant also observes that plaintiffs have listed their apartment for sale (NYSCEF 52), thus implying that they are not willing to cure the default without vacating. Moreover, even if plaintiffs were found to have a desire to remove the washing machine, they fail to address the hole in the bathroom wall, as listed in the notice, and thus, do not evince a good faith desire an ability to cure all defaults in the notice. (NYSCEF 48).

3. Oral argument (NYSCEF 57)

At oral argument of this motion, defendant conceded that residential tenants may seek a

Yellowstone injunction, and that it is only contesting whether plaintiffs have the willingness and ability to cure the defaults without vacating the building.

As evidence of plaintiffs' desire and ability to cure the defaults, plaintiffs' counsel referenced plaintiff's affidavit in which he states that "[a]lthough I believe that I have the right to continue to keep my washing machine, it is simply not important enough of an issue to keep it. Hence, I truly thought that the corporation would be willing to extend the cure period and avoid this litigation while we negotiated the scope of work and time within which it needed to be performed."

B. Analysis

To obtain a stay of the period within which an alleged default must be cured until the merits of the dispute are resolved in court and to avoid the forfeiture of a substantial leasehold interest, the movant

> must demonstrate 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, 514 [1999]).

Defendant concedes that plaintiffs meet the first three requirements for obtaining a *Yellowstone* injunction. Thus, all that need be addressed is whether plaintiffs are prepared and maintain the ability to cure the alleged default.

It is the movant's burden to "convince the court of his desire and ability to cure the defects by any means." (*Jemaltown of 125th St., Inc. v Leon Betesh/Park Seen Realty Assocs.*, 115 AD2d 381, 381 [1st Dept 1985]). That the movant denies a default is not dispositive, as long

as it evinces a good faith willingness to cure. (*Artcorp. Inc. v Citirich Realty Corp*. 124 AD3d 545, 546 [1st Dept 2015]). Here, plaintiffs take issue with the basis for the notice to cure, without expressing that they are prepared and able to cure the alleged default. (*See Confidence Beauty Salon Corp. v 299 Third SA, LLC*, 148 AD3d 439, 439–440 [1st Dept 2017] [affirming denial of *Yellowstone* relief where "plaintiff failed to aver [...] that it had the ability to cure its alleged defaults"]). Moreover, their belief that the scope of work is "vaguely-specified," and that they desire to negotiate it demonstrates an unwillingness to cure. As plaintiffs fail to satisfy their burden of showing their desire to cure by any means short of vacating, plaintiffs' request for a *Yellowstone* injunction is denied. Thus, their contentions concerning whether they defaulted under the lease are not addressed.

III. MOTION TO AMEND

A. Contentions

1. Plaintiffs (NYSCEF 46)

Plaintiffs argue that as only four months have elapsed since they filed their original complaint, and no substantial discovery has taken place, defendant will not be prejudiced by an amended complaint. They submit a proposed amended complaint which adds causes of action for abuse of process, intentional infliction of emotional distress, and *prima facie* tort (NYSCEF 42), although by letter dated March 20, 2019, they withdraw their request to add the causes of action for intentional infliction of emotional distress and *prima facie* tort (NYSCEF 61), and submit a new proposed amended complaint containing only the amended abuse of process cause of action (NYSCEF 62).

In the alternative, plaintiffs request an extension time to reply to defendant's counterclaim.

2. Defendant (NYSCEF 48)

Defendant asserts that plaintiffs are not entitled to amend their complaint as their proposed amendments lack merit. It argues that the proposed cause of action for abuse of process fails because it has not regularly issued process, and its August 2018 letter does not subject plaintiffs to a court's jurisdiction. Additionally, defendant denies any intent to do harm without excuse or justification. Rather, defendant's letter was intended to protect its building. Moreover, the proposed amended complaint contains no allegation that the letter was sent in a "perverted manner," nor does it allege that defendant had a "collateral objective" in sending it.

B. Analysis

A motion for leave to amend a pleading should be freely granted unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit. (CPLR 3025; *Maldonado v Newport Gardens, Inc.*, 91 AD3d 731 [2d Dept 2012]). No prejudice or surprise is shown when the proposed complaint sets forth new claims or theories based on the facts set forth in the original complaint. (*See e.g., Brewster v Baltimore & Ohio R. Co.*, 185 AD2d 653 [4th Dept 1992] [when proposed amendment sets forth no new facts but adds additional theory of recovery, leave should generally be granted]; *see also MBIA Ins. Corp. v J.P. Morgan Securities, LLC*, 144 AD3d 635 [2d Dept 2016] [defendants could not legitimately claim surprise or prejudice as proposed amendment premised on same facts, transactions, or occurrences as in original complaint]). Leave must be denied if the proposed amended complaint is "palpably insufficient or patently devoid of merit." (*MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 499 [1st Dept 2010]).

To state a claim for abuse of process, the plaintiff must allege that the defendant: (1) regularly issued process; (2) intended to do harm without excuse or justification; and (3) used

the process in a perverted manner to obtain a collateral objective. (*Casa de Meadows Inc. [Cayman Islands] v Zaman*, 76 AD3d 917, 921 [1st Dept 2010], quoting *Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). Process is defined as a "direction or demand that the person to whom it is directed shall perform or refrain from the doing of some described act." (*Williams v Williams*, 23 NY2d 592, 596 [1969] [citations omitted]). Moreover, to be actionable, "the judicial process must in some manner be involved." (*Varela v Inv'rs Ins. Holding Corp.*, 185 AD2d 309, 311 [2d Dept 1992], *affd* 81 NY2d 958 [1993]).

As the parties stipulate that the August 2018 letter does not constitute a notice to cure, and as a notice to cure does not invoke judicial process (*see e.g.*, *Senagryph Training Facilities v Oscar Aristizabal*, 2007 WL 2175416, *1 [Sup Ct, NY County 2007] [service of successive notices to cure by landlord cannot be predicate for action for abuse of process]), plaintiffs proposed cause of action for abuse of process is not meritorious.

When an answer contains a counterclaim, an opposing party has 20 days within which to serve a reply. (CPLR 3012[a]). Here, defendant filed its answer on November 21, 2018, and thus, the time for plaintiffs to file a reply has expired. Pursuant to CPLR 3012(d), the court may extend the time in which a party has to serve a responsive pleading, "provided that there is a showing of a reasonable excuse for the delay." (*Emigrant Bank v Rosabianca*, 156 AD3d 468, 472 [1st Dept 2017]). That plaintiffs sought to amend their complaint nearly two months after defendant filed its answer does not sufficiently explain their failure to comply with the 20-day deadline. Accordingly, plaintiffs' request for an extension of time to file a reply is denied.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion is denied in its entirety; and it is further

ORDERED, that the parties are to appear for a preliminary conference on July 24, 2019 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

5/7/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE