

Ohebshalom v 284-5 Apt Inc.
2023 NY Slip Op 34085(U)
November 16, 2023
Supreme Court, New York County
Docket Number: Index No. 652780/2023
Judge: Lyle E. Frank
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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ROBERT OHEBSHALOM, BLUE SEA ASSOCIATES,
L.L.C., HIGHPOINT ASSOCIATES XIII, L.L.C., CAPITAL
ASSOCIATES L.L.C.

Plaintiff,

- v -

284-5 APT INC.,

Defendant.

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INDEX NO. 652780/2023

MOTION DATE 07/25/2023,
11/09/2023

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 107, 108

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, plaintiffs' application seeking a Yellowstone Injunction is granted and plaintiffs' motion to amend the complaint is granted.

Plaintiffs, tenants, bring the action alleging breach of contract, *inter alia*. Plaintiffs contend that contrary to defendant's contentions they are not in rental arrears rather defendant has breached the purchase agreement for the subject premises. Notwithstanding the underlying dispute, plaintiff now moves this Court by order to show cause seeking injunctive relief, preventing defendant from attempting to terminate plaintiffs' commercial lease. Defendant opposes the instant motion and cross-moves to dismiss the complaint. Plaintiff moves separately, by order to show cause, to amend the complaint. For the reasons set forth below,

plaintiff's application for a Yellowstone injunction is granted, its motion to amend the complaint is granted and defendant's cross-motion to dismiss is denied.

Preliminarily, it must be noted that defendant urged this Court to convert its motion to dismiss into one for summary judgment, however the Court declines that request as plaintiffs were not afforded adequate notice to oppose the motion.

Motion Sequence 001

The purpose of a Yellowstone injunction is to maintain the status quo so that commercial tenant may protect its valuable property interest in the lease while challenging landlord's assessment of its rights. *225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420 [1st Dept 1995].

Granting of a Yellowstone injunction requires from the tenant the satisfaction of four factors: (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 cure period; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises. *Gap, Inc. v. 170 Broadway Retail Owner*, 195 AD3d 575, 576 [1st Dept 2021].

Plaintiffs have established that it satisfies the four criteria above and has submitted evidence to support the contention that they are ready, willing and able to cure the alleged default.

In opposition to the motion, defendant contends that plaintiffs have failed to establish that it was not in default of the lease and that they are ready willing and able to cure the default. As stated above, the Court is satisfied that plaintiffs have demonstrated that they are in fact ready, willing and able to cure the default. Defendant has not cited to any case law to support the

position that plaintiffs must establish they are not in default in order to obtain a Yellowstone injunction. While defendant takes issue with the proof of the funds being submitted in reply, the Court does not rely on the submission, as it is not in admissible form, and deems plaintiffs' affidavit in support of the application swearing that they are ready, willing and able to cure as sufficient.

As to defendant's cross-motion that seeks dismissal of the complaint, the Court finds that in the light most favorable to plaintiffs, defendant has not established entitlement to dismissal as a matter of law.

It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible inference. *See Avgush v Town of Yorktown*, 303 AD2d 340 [2d Dept 2003]; *Bernberg v Health Mgmt. Sys.*, 303 AD2d 348 [2d Dept 2003]. Moreover, the Court must determine whether a cognizable cause of action can be discerned from the complaint rather than properly stated. *Matlin Patterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]. "The complaint must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory." *Id.*

"In a motion to dismiss pursuant to CPLR 3211 (a) (1), the defendant has the burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] internal quotations and citations omitted). Further, dismissal pursuant to CPLR § 3211(a)(1) is warranted where documentary evidence

“conclusively establishes a defense to the asserted claims as a matter of law.” *Gottesman Co. v A.E.W, Inc.*, 190 AD3d 522, 24 [1st Dept 2021].

In support of the motion to dismiss based on documentary evidence, defendant submits the purchase agreement as well as affidavits. It is well established that affidavits of fact witnesses are not deemed documentary evidence for the purpose of a motion to dismiss. Accordingly, at this juncture and based on the lack of notice to convert the motion as one for summary judgment the motion to dismiss is denied.

Motion Sequence 002

Plaintiff moves to amend the complaint by order to show cause¹. During oral argument, defendant did not object to plaintiffs application to amend the complaint, however requested that the Court did not consider the proposed amended complaint as a basis to grant plaintiffs’ application for a Yellowstone injunction. As the Court did not refer to the proposed amended complaint in its consideration of plaintiffs’ injunction application, the Court deems plaintiffs’ motion unopposed. Accordingly, it is hereby

ADJUDGED that plaintiffs’ application, motion sequence 001, seeking a Yellowstone injunction is granted; and it is further

ORDERED that defendant, its affiliates, agents, attorneys, employees, and anyone acting on its behalf or under its control are enjoined from taking further steps to terminate or purport to terminate Plaintiff’s tenancy, commence a holdover summary proceeding, or otherwise regain possession of the Premises; and it is further

¹ Generally the Court will not deem motions to amend pleadings as emergencies, however based on the prior pending motion to dismiss the Court allowed the expedited motion to amend.

ORDERED that defendant, its agents, attorneys, employees, and anyone action on its behalf or under its control is enjoined from taking any steps to regain or wrongfully interfere with Plaintiff's possession of the Premises; and it is further

ORDERED that the plaintiffs' motion for leave to amend the complaint herein is granted, and the second amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further pond thereto within 20 days from the date of said service.

11/16/2023**DATE**

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

APPLICATION:

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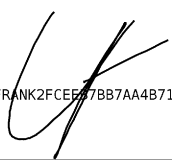
SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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LYLE E. FRANK, J.S.C.☒

NON-FINAL DISPOSITION

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GRANTED IN PART

☐

OTHER

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE