

Wharton-Bickley v 388 Broadway Owners LLC

2024 NY Slip Op 34668(U)

January 9, 2024

Supreme Court, New York County

Docket Number: Index No. 154534/2023

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

ANDREW WHARTON-BICKLEY and GALEN LANIER,

Plaintiffs,

- v -

388 BROADWAY OWNERS LLC and CARDINAL CREDIT
IX LLC,

Defendants.

-----X

INDEX NO. 154534/2023
MOTION DATE 05/18/2023
MOTION SEQ. NO. 001

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 6, 7, 8, 9, 10, 11,
12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33

were read on this motion for A YELLOWSTONE INJUNCTION

Plaintiffs are the residents of an apartment unit located within 388 Broadway in
Manhattan pursuant to a form "New York Commercial Lease Agreement" (NYSCEF Doc. No.
2). There is no dispute that they utilize the premises as their residence, and plaintiffs submit a
copy of the defendant owner's registration renewal application of their unit with the New York
City Loft Board as an Interim Multiple Dwelling Unit (see, NYSCEF Doc. No. 3). Moreover,
plaintiffs have filed an application with the Loft Board for "Protected Occupancy Status,"
referencing defendant owner's continued registration of the apartment as an Interim Multiple
Dwelling Unit (see, NYSCEF Doc. No. 4).

Defendants served a notice of default upon plaintiffs, noticing various alleged breaches of
lease which, taken together, allege: the carrying on of loud and disruptive parties being
conducted from the apartment causing a nuisance to other occupants of the building and
involving the sale of alcoholic beverages without a license; the unauthorized installation of
interior walls within the apartment; and unsanitary conditions caused by plaintiffs' placement of

rubbish within the common areas of the building. The notice warns that the lease will be terminated as of May 31, 2023, absent cessation of the alleged defaults. Specific lease provisions cited in the notice are those prohibiting unauthorized improvements to the apartment (§ IX) and those prohibiting tenant use which violates “any law, rules and requirements that may be imposed by any authority” (§ XIX). In connection with the latter, the notice references New York City Administrative Code § 27 prohibiting the use of an “enclosed room or space in which seventy-five or more persons gather for . . . the consumption of food or drink” without a permit, as well as section 64 of the New York State Alcohol Beverage Control Law prohibiting the sale of alcoholic beverages in an assemblage of twenty or more persons without a license.

Plaintiffs commenced this action seeking to enjoin defendants from terminating the lease and now move for a preliminary injunction to that effect, citing *First Natl. Stores v Yellowstone Shopping Ctr.* (21 NY2d 630 [1968]) (a “Yellowstone Injunction”). The motion must be denied for the following reasons.

First, the protections afforded by a Yellowstone Injunction are generally reserved for commercial tenants (*see, First Natl. Stores, supra; Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.*, 93 NY 2d 508 [1999]). Here, by plaintiffs’ own admission, the premises involved is under renewed registration as a dwelling and plaintiffs’ own Loft Board application for “Protected Occupancy Status” confirms their desire to have it so.¹ Second – and even were this court prepared to view the premises as a commercial unit for *Yellowstone* purposes – an essential element of Yellowstone injunctive relief is a tenant’s manifest commitment to cure the defaults noticed in the landlord’s notice of default (*see, id.*). Nothing is

¹ Insofar as plaintiffs’ counsel submits a copy of a Work Permit Data form indicating a conversion of the premises “from commercial to residential” (NYSCEF Doc. No. 24); in the court’s view, that actually stands as further evidence of all parties’ intentions to have the premises recognized and treated as a residential dwelling.

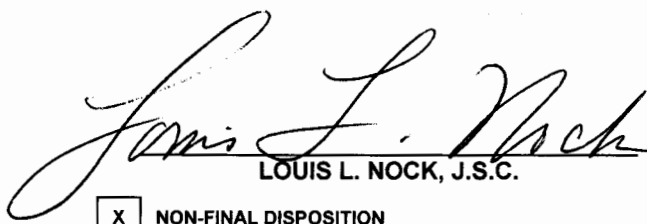
found in the present record to “convince the court” of such commitment (*Cemco Restaurants, Inc. v Ten Park Ave. Tenants Corp.*, 135 AD2d 461, 463 [1st Dept 1987], *appeal dismissed* 72 NY2d 840 [1988]). Therefore, the motion must be denied.

Accordingly, it is

ORDERED that plaintiffs’ motion for a Yellowstone Injunction is denied; and it is further

ORDERED that a status conference be convened on February 14, 2023, at 10:00 a.m., at the Courthouse, 111 Centre Street, Room 1166, New York, New York.

1/9/2024
DATE


LOUIS L. NOCK, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE