

Capacchione v 8 W. 13th St. Tenants Corp.

2025 NY Slip Op 31129(U)

April 4, 2025

Supreme Court, New York County

Docket Number: Index No. 652895/2022

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

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AGATHA CAPACCHIONE,

Plaintiff,

INDEX NO. 652895/2022

MOTION DATE 05/24/2024

MOTION SEQ. NO. 001

- v -

8 WEST 13TH STREET TENANTS CORPORATION, THE
BOARD OF DIRECTORS OF 8 WEST 13TH STREET
TENANTS CORPORATION

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77, 98

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

Upon the foregoing documents, oral argument, and after a final submission date of January 13, 2025, Plaintiff’s motion for a *Yellowstone* injunction is granted.¹ 8 West 13th Street Tenants Corporation and the Board of Directors of 8 West 13th Street Tenants Corporation cross motion for an undertaking pursuant to CPLR 6312(b) is denied, without prejudice, with leave to renew upon proper supporting papers or in the alternative after a CPLR 6312(c) hearing.

I. Background

Since 2008, Plaintiff has been a shareholder of the co-op at 8 West 13th Street, New York, New York (the “Building”) and has lived in Apartment 11 RW (the “Apartment”). In 2014, a skylight in the Apartment leaked and damaged the Apartment’s interior, requiring repairs. Plaintiff

¹ The Court held a hearing on August 8, 2024, where Amber R. Will, Esq. and Y. David Scharf, Esq. appeared for Plaintiff, and Gil Santamarina, Esq. and Hillary A. Fraenkel, Esq., appeared for Defendants. At the hearing parties stated on the record there were discussions regarding settlement, so the Court adjourned the final submission date to allow the parties time to reach an amicable resolution. As that has not happened, the Court rules on the motion.

hired an engineer. Defendants reviewed the renovation plans prior to construction and allegedly signed and approved the plans in March of 2015. The plans were amended because more extensive damage was found. The New York City Department of Buildings (“DOB”) approved the amended plans, and the Board allegedly reviewed and approved the amended plans in December of 2015.

According to Plaintiff, in April of 2016, the Board retained an auditor to review the renovation plans, and the Board issued a stop work order in May of 2016. The Board lifted the stop work order in June of 2016 after the Board’s questions regarding the renovation plans were answered, and the renovations were completed by the end of 2016. There was never any concern with the renovations until a prospective buyer of the Apartment approached Plaintiff in June of 2022, at which time Defendants informed Plaintiff that they had never approved Plaintiff’s installation of bi-fold windows. Plaintiff commenced this lawsuit via summons with notice on August 12, 2022, and for almost two years the parties repeatedly stipulated to extensions of time to file the Complaint.² A notice to cure was sent to Plaintiff on February 13, 2024, threatening to terminate Plaintiff’s lease unless the bi-fold windows are removed. Plaintiff filed her Complaint on May 17, 2024, seeking declaratory judgment, damages for alleged breaches of fiduciary duty, tortious interference with contract, and slander of title. Now, Plaintiff asks this Court for a *Yellowstone* injunction while Defendants oppose and cross-move for an undertaking.

II. Discussion

Plaintiff’s motion for a *Yellowstone* injunction is granted. The standard in granting a *Yellowstone* injunction is far less onerous than that of a preliminary injunction, and requires the party seeking the injunction to show:

“(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

² The record reflects the parties resolved some of the issues that precipitated the filing of the summons during this timeframe (NYSCEF Doc. 28 at ¶ 38).

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.”

(*Wharton-Bickley v 388 Broadway Owners LLC*, --NYS3d--, 2025 NY Slip Op 00802 at *3 [1st Dept 2025] quoting *Graubard Mollen Horowitz Pomeranz & Shapiro*, 93 NY2d 508, 514 [1999]).

Although *Yellowstone* injunctions are typically not available for residential proprietary leases as those tenants may rely on the protections of RPAPL 753(4), there are exceptions to this rule where an RPAPL 753(4) application is inadequate (*see Stolz v 111 Tenants Corp.*, 3 AD3d 421, 422 [1st Dept 2004]). Pursuant to RPAPL 753(4), in the event of an eviction proceeding based on a breach of a lease, a Court may issue a thirty day stay of the issuance of a warrant for eviction to allow the alleged breach to be cured. This remedy is inadequate where, as here, to cure an alleged breach would require greater than thirty days due to Department of Buildings requirements (*Stolz, supra*). Therefore, that Plaintiff maintains a residential proprietary lease is no bar to the issuance of a *Yellowstone* injunction.

Further, there is no dispute that Plaintiff received a notice to cure, and Plaintiff moved for injunctive relief prior to the termination of the lease and time to cure expired (*see* NYSCEF Doc. 44). Finally, Plaintiff has shown a willingness to cure the default should this Court find the notice to cure valid (NYSCEF Doc. 28 at ¶ 40). This is sufficient to grant Plaintiff’s motion for a *Yellowstone* injunction (*Wharton-Bickley, supra* at *5). Therefore, Plaintiff’s motion is granted.

Defendants’ cross motion asking this Court to direct Plaintiff file an undertaking pursuant to CPLR 6312(b) in the amount of \$150,000 is denied without prejudice with leave to renew upon proper supporting papers or after a CPLR 6312(c) hearing. “[A]n undertaking should be set in an amount ‘rationally related to the quantum of damages which [landlord] would sustain in the event

that [tenant] is later determined not to have been entitled to the injunction” (*East 54th Operating LLC v Brevard Owners, Inc.*, 223 AD3d 407, 408 [1st Dept 2024] quoting *61 W. 62nd Owners Corp. v Harkness Apt Owners Corp.*, 173 AD2d 372, 373 [1st Dept 1991]).

The only support Defendants have set forth in their request for an undertaking is the expert affidavit of Robert C. Tochterman, a registered architect (NYSCEF Doc. 76). Mr. Tochterman grounds Defendants’ request for a \$150,000 bond based on his estimate of the costs of repairing the parapet walls around the roof of the Building. His estimate is imprecise, stating the repairs could be “\$50,000 to \$150,000.” Moreover, Mr. Tochterman concedes that he is “not directly involved with pricing of construction work” and provides no expert basis for his \$50,000 to \$150,000 estimate. Mr. Tochterman provides the costs to repair the parapet walls of the roof of the building, which is unrelated to the notice to cure – which requires Plaintiff replace what she believes to be bi-fold windows with windows that are permanently bolted shut (*see East 54th Operating LLC, supra* at 409 [“the amount of the bond set by the court is the same as landlord’s estimated cost of repairs, which is unrelated to the amount of damages that may flow from imposition of the *Yellowstone* injunction.”])).

In other words, if this Court were to find the *Yellowstone* injunction should not have been granted, the remedy is to direct Plaintiff to install permanently bolted windows and to pay for any Department of Buildings citations which may or may not be issued for the allegedly non-compliant parapet wall. Thus, the proper basis for any undertaking would be the cost to replace the allegedly inappropriate windows and to pay for Department of Buildings citations. Therefore, based on this record, there is no rational basis for this Court to direct Plaintiff to post an undertaking in the range of \$50,000 to \$150,000. To be clear: Defendants are entitled to an undertaking pursuant to CPLR

6312(b) as Plaintiff has obtained a *Yellowstone* injunction. However, the Court cannot grant the undertaking until a rationally related amount for the undertaking has been submitted to the Court.

Accordingly, it is hereby,

ORDERED that Plaintiff’s motion for a *Yellowstone* injunction is granted, and Defendants are enjoined from taking any action from terminating Plaintiff’s proprietary lease until a resolution of this lawsuit is reached, and in the event this Court finds that Plaintiff has defaulted under the terms of the lease, the running period for which Plaintiff may cure her alleged default set forth in Defendants’ notice to cure dated February 13, 2024 is tolled until a reasonable period of time after this Court determines a default exists; and it is further

ORDERED that Defendants’ cross motion for an undertaking pursuant to CPLR 6312(b) is denied, without prejudice, with leave to renew upon proper supporting papers or, in the alternative, after a CPLR 6312(c) hearing, for which the parties may contact the Court via e-mail at SFC-Part33-Clerk@nycourts.gov to schedule; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

<u>4/4/2025</u> DATE	<u>Mary V Rosado JSC</u> HON. MARY V. ROSADO, J.S.C.					
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE