Summer v Ruckus 85 Corp.
2012 NY Slip Op 31889(U)
July 13, 2012
Supreme Court, New York County
Docket Number: 114295/11
Judge: Louis B. York
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SCANNED ON 7/18/2012
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK, J.S.C. Justice

PART 2

Summer, et al.,

-v-

Ruckus 85 Corp., et al.

INDEX NO. 114295/11

MOTION DATE 6/8/12

MOTION SEQ. NO. 05

The following papers, numbered 1 to ____ , were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion ~~is~~ for a preliminary injunction is decided in accordance with the accompanying decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____
FOR THE FOLLOWING REASON(S): ____

FILED

JUL 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/13/12

____, J.S.C.
LOUIS B. YORK

1. CHECK ONE: .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---x

THOMAS SUMMER, SYDNEY LICHT
and ELIZABETH LOGAN HARRIS, individually
and on behalf of RUCKUS 85 CORP.,

Plaintiffs,

Index No 114295/11

-against-

RUCKUS 85 CORP., CHARLES GROOMS,
LYSIANE LUONG GROOMS, and
YVETTE GEORGES DEETON,

Defendants,

---x

FILED
JUL 18 2012
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YORK, J.:

Defendant Yvette Georges Deeton ("Deeton") moves, by an order to show cause, for a preliminary and/or permanent injunction restraining plaintiffs from terminating her proprietary lease and from disregarding her vote at shareholders' meetings and for the related relief.

BACKGROUND

This action arose out of a dispute between groups of shareholders in Ruckus 85 Corp. ("Ruckus"), a coop at 85 Walker Street, New York City. The detailed background information is presented in previous orders of this court, and only the essential facts are described here.

On April 13, 2011 a piece of the cast-iron water table fell from the building façade of 85 Walker Street into the street. The same day the New York City Department of Buildings

("DOB") issued a notice of a "class one" violation, which required urgent repairs. The shareholders of the corporation could not agree on a contractor to do the work. According to an amended certificate of incorporation and by-laws, a vote of 75% of all issued and outstanding shares is required to take corporate action. A quorum requires the presence of members owning at least 75% of stocks in the corporation. Deeton, who owns 12 of 44 issued shares (27.3%), did not approve the other members' preference to hire Deluc Inc. ("Deluc") and refused to pay her proportionate share of repair expenses. This suit followed. The corporation issued to Deeton a notice to cure the default on January 9, 2012 and attempted to terminate her proprietary lease. After Deeton submitted two motions seeking to enjoin the corporation from doing this, the parties signed a "so ordered" stipulation on February 24, 2012 ("Order"). Pending adjudication on the merits, the parties reached a temporary accommodation. Deeton agreed not to interfere with the work to repair the damage to the building and to pay her share of the expenses. Plaintiffs agreed to withdraw notice of termination of Deeton's lease. The governance of Ruckus was to be by a simple majority vote of issued and outstanding shares instead of a 75% majority with a simple majority constituting a quorum. Each of the parties committed itself to uphold its fiduciary duty to the corporation and each other.

Soon after the order was signed, parties moved for contempt accusing each other of violating the terms of the order. Their respective motions were denied.

On April 25, 2012 the corporation served a notice on Deeton to cure her default in paying late charges in the amount of $1,550.85. The deadline for curing the default was May 7, 2012. On May 8, 2012 Deeton received a second notice to cure, related to her failure to pay $7,456.50 in attorneys' fees incurred when the corporation sought to compel Deeton to pay her share of the repair expenses. Now Deeton moves for a Yellowstone injunction with respect to a notice to

cure dated May 8, 2012 and for a preliminary injunction to restore her voting rights. She also seeks to invalidate the shareholders' meeting of May 8, 2012 at which her vote was not counted. In addition, she urges the court to declare that the assessment of late fees was unlawful, and that she does not have an obligation to pay the corporation's attorneys' fees. Pending determination of this motion a temporary restraining order ("TRO") was issued to enjoin plaintiffs and Ruckus from taking any action to terminate Deeton's lease and from interfering with her rights to vote and to fully participate as a shareholder at all shareholders' meetings. Additionally, the TRO tolled the accrual of interest and late charges against Deeton.

DISCUSSION

Defendant Deeton framed her application for injunctive relief as a Yellowstone injunction. As a preliminary matter, a Yellowstone injunction applies only to the termination of the lease, and not to other issues, such as a right of a shareholder to vote at a shareholders' meeting. These issues must be examined under general standards applicable to granting injunctive relief.

Yellowstone injunction

A Yellowstone injunction (First Nat. Stores, Inc. v Yellowstone Shopping Ctr., Inc., 21 NY2d 630, 631; 290 N.Y.S.2d 721 [1968]) stays the running of time to cure alleged lease violations by a tenant and to maintain the status quo during the pendency of an underlying dispute. Courts routinely grant Yellowstone injunctions because "[t]he threat of termination of the lease and forfeiture, standing alone, [are] sufficient to permit maintenance of the *status quo* by injunction." Post v 120 E. End Ave. Corp., 62 NY2d 19,26; 475 N.Y.S.2d 821 [1984]. However an application for a Yellowstone injunction must be timely. Such application must be

made not only prior to issuance of a termination note, but also prior to the expiration of the period to cure a default. Retropolis, Inc. v 14th St. Dev. LLC, 17 AD3d 209, 210; 797 N.Y.S.2d 1 [1st Dept 2005] (tenant was not entitled to a Yellowstone injunction in connection with default notice, where relief was sought after the applicable cure period expired.) KB Gallery, LLC v 875 W. 181 Owners Corp., 76 AD3d 909; 907 N.Y.S.2d 672 (Mem) [1st Dept 2010] (rejecting plaintiff's contention that a Yellowstone application brought after the expiration of the applicable cure period will be deemed timely if it is made before the lease in question is actually terminated).

In this case the first notice of default set a deadline to cure it for May 7, 2012. Defendant did not seek to stay the cure period before that date. She has thus forfeited the Yellowstone relief in connection with this default notice. Her application for the Yellowstone injunction after she had received the second notice of default on May 8, 2012 was within the cure period, and thus timely.

Preliminary injunction

According to CPLR 6301 a "preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual." A defendant who asserts a counterclaim or cross-claim may also move for a preliminary injunction. CPLR 6001. The purpose of this provisional remedy is to preserve the status quo until the case can be fully adjudicated on the merits.

Unlike a Yellowstone injunction, a preliminary injunction restraining a party to litigation during its pendency is a drastic measure. The movant must demonstrate: (1) likelihood of success on the merits of the action; (2) danger of irreparable injury in the absence of preliminary

injunctive relief; and (3) a balance of equities in favor of the moving party. In applying these requirements, the court must "weigh a variety of factors," and the matter is committed to the court's sound discretion. Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840; 800 N.Y.S.2d 48, [2005].

Deeton's rights as a shareholder to vote on corporate matters requires the court's urgent attention at this point. A significant factor that shifts the balance of equities in favor of Deeton is the so-ordered stipulation of February 24, 2012 which was aimed at preserving the status quo. This order was not modified or vacated, and remains in effect. The parties crafted their *modus vivendi* for the time until this court issues a final decision on the merits. The circumstances that gave rise to the current situation were in place at the time of the stipulation: Deeton owed late fees for failure to pay her share of the maintenance expenses, and the corporation incurred legal fees to collect Deeton's contribution and then to act on her default. Though these were not included in the stipulation, the controversy over late fees and attorneys' fees is directly related to the essence of the underlying dispute – Deeton's claim that she is not obligated to finance a corporate action that was adopted in violation of the corporation's voting procedures. Choosing to pursue Deeton's default at this time is a backdoor maneuver to get rid of an inconvenient shareholder in the middle of a pending litigation. It is contrary, if not to the letter of the signed stipulation, then certainly to its spirit.

Deeton's vote at the May 8, 2012 shareholders' meeting did not count under a provision of the by-laws that authorizes such restriction. (Article VI, Section 6, Deeton Exh. D). Depriving Deeton of her voting rights is inconsistent with the stipulation, and severely changes the balance of power in the corporation. There is a high probability that this provision in the by-laws be stricken when the case is adjudicated on the merits. In a similar case where the

corporation disqualified a shareholder from voting at the annual meeting for failure to pay maintenance expense, the First Department held that "[T]he bylaws are ineffective to deprive the record shareholders of the right to vote provided by Business Corporation Law, s 612(a). "Yu v Linton, 68 AD2d 856, 414 N.Y.S.2d 558 [1st Dept 1979]. The relevant section reads:

> Every shareholder of record shall be entitled at every meeting of shareholders to one vote for every share standing in his name on the record of shareholders, unless otherwise provided in the certificate of incorporation.
>
> Business Corporation Law § 612(a).

In view of an unequivocal requirement of the law, and the balance of equities in favor of Deeton, the preliminary injunction to restore Deeton's voting rights is granted. A preliminary injunction can be used to restore the status quo as it existed prior to commencement of the conduct enjoined. Bd. of Higher Ed. of City of New York v Marcus, 63 Misc 2d 268; 311 N.Y.S.2d 579 [Sup Ct Kings Cty 1970]. The decisions taken at the May 8, 2012 shareholders' meeting without counting Deeton's voice are declared void. However the election of Thomas Summer as president of the corporation and Lysiane Luong Grooms as treasurer is valid, since the same result would have been achieved had Deeton's vote been counted. Some items on the agenda of the May 8 meeting were voted on at a subsequent meeting on May 24, 2012 where Deeton's vote was counted due to the temporary restraining order in place. The remaining issues –consideration of an alternate management company and election of the secretary -- should be decided at the meeting of shareholders under the voting procedures described in the order of February 24, 2012.

The court declines to consider other issues raised by Deeton's motion, and to rule on whether the assessment of late fees against Deeton was warranted and whether she was obligated to pay attorneys fees. These issues are part of the underlying dispute and will be considered on the merits.

CONSLUSION

Accordingly, it is

ORDERED that that the Yellowstone injunction tolling the cure period in relation to a default notice dated May 8, 2012 is granted on the condition that defendant Deeton posts a bond in the amount of $10,000; and it is further

ORDERED that the preliminary injunction enjoining plaintiffs and Ruckus from interfering with Deeton's voting rights as a shareholder of the corporation is granted; and it is further

ORDERED that the results of the shareholders' meeting on May 8, 2012 are declared void, and a new vote on the issues decided at that meeting is to be taken at a meeting of shareholders to be held within 45 days of the service of a copy of this order with notice of entry; and it is further

ORDERED that the remaining parts of the motion are denied.

FILED

JUL 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/13/12

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.