

Surdeanu v 137 E. St., LLC

2003 NY Slip Op 30259(U)

April 11, 2003

Supreme Court, New York County

Docket Number: 116029/02

Judge: Rosalyn H. Richter

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

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AURELIAN SURDEANU,

Plaintiff,

-against-

137 EAST 110th STREET, LLC,

Defendant.

DECISION AND ORDER
Index No. 116029/02
Motion Sequence No. 1

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ROSALYN RICHTER, J.S.C.

In this action, plaintiff, who is a commercial tenant running a barber shop, moves for a *Yellowstone* injunction enjoining defendant landlord from taking any action to terminate plaintiffs lease, and tolling the time to cure the default alleged in the Notice to Cure dated June 26,2002.' In that notice, defendant claimed that plaintiffs unauthorized use of an unlicensed plumber, who allegedly turned off the gas to the building, violated lease provisions governing changes and alterations made to the subject premises. The Notice further alleged that plaintiffs acts caused defendant to suffer financial damages of over \$15,000 and that plaintiff had refused defendant's demand for reimbursement. The Notice gave plaintiff ten days to cure the above defaults.

The party requesting a *Yellowstone* injunction must demonstrate that: (1) it holds a commercial lease; (2) it received a notice to cure from the landlord; (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 Avenue Associates*, 93 N.Y.2d 508 (1999); *225 East 36th Street Garage Corp. v. 221 E. 36th Owners Corp.*, 211 A.D.2d 420 (1st Dept. 1995). Defendant contends

¹ On October 10, 2002, Justice Helen E. Freedman issued a temporary restraining order granting the requested relief until this motion could be decided.

that plaintiff has failed to show that he is willing and able to cure the alleged default in the event he does not prevail.² However, in his affidavit, plaintiff states that he understands that the purpose of a *Yellowstone* injunction is to preserve the *status quo* so as to permit plaintiff an opportunity to effectuate an appropriate cure, and thus avoid forfeiture of the lease. In this case, the cure demanded in the notice requires plaintiff to pay the landlord the \$15,000. In his affidavit, plaintiff states that he has been, and continues to be, timely on his rent payments, a statement undisputed by defendant. Thus, the Court concludes that plaintiff has made an adequate showing that he is prepared and maintains the ability to cure the alleged default.

Defendant also argues that plaintiff has waived his right to bring this motion by virtue of a lease provision barring plaintiff from seeking *Yellowstone* relief. The provision in question states that plaintiff “waives his right to bring a declaratory judgment action with respect to any provision of the lease, or with respect to any notice sent pursuant to the provisions of the lease, and expressly agrees not to seek injunctive relief which would stay, extend or otherwise toll any of the time limitations or provisions of this lease, or any notice sent pursuant thereto.”

The Court concludes that this provision is unenforceable as against public policy. Since plaintiff is a commercial tenant, he is not able to avail himself of the automatic ten day stay available to residential tenants in Civil Court under R.P.A.P.L. § 753[4]. Thus, a *Yellowstone* injunction is the only way a commercial tenant, “when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture.” *See Graubard, Mollen, Horowitz, Pomeranz & Shapiro v. 600 Third Avenue Associates*, 93 N.Y.2d at 508. Moreover, the waiver provision here is not limited to *Yellowstone* injunctions; it would also

² It is undisputed that plaintiff has established the first three requirements.

prevent plaintiff from instituting *any* declaratory judgment action with respect to the lease. The Court concludes that such a wide ranging waiver of the right to use the court system to seek redress is unenforceable. *See W & S Associates, L.P. v. Absolute Greek, Inc.*, 186 Misc.2d 170 (Nassau Cty. Sup. Ct. 2000) (finding unenforceable lease provision barring tenant from interposing counterclaims in plenary action). Accordingly it is

ORDERED that plaintiffs motion for a *Yellowstone* injunction is granted; and it is further

ORDERED that defendant, its attorneys, and all persons known and unknown acting on its behalf or in concert with it, in any manner or by any means, are enjoined and restrained, pending the hearing and determination of this action, from taking any action, including but not limited to the commencement of legal proceedings, to terminate the lease agreement for Store #1 at 137 East 110th Street, based on the Notice to Cure dated June 26, 2002, and it is further

ORDERED that the time to cure the alleged default set forth in that Notice is hereby tolled; and it is further

ORDERED that this injunction is conditioned upon plaintiff posting an undertaking in the amount of \$2,500, as well as payment by plaintiff of any past due rent and all future rent as it becomes due; and it is further

ORDERED that the parties are to appear for a preliminary conference in Part 24 on May 7, 2003 at 10:30 a.m.

This constitutes the decision and order of the Court.

April 11, 2003



Justice Rosalyn Richter