

M E M O R A N D U M

SUPREME COURT : QUEENS COUNTY
IAS PART 5

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ROMARK ASSOCIATES,

Plaintiff,

- against -

833 CENTRAL OWNERS CORP. and
BENEDICT REALTY GROUP, LLC,

Defendants.

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INDEX NO. 20319-07

BY: DOLLARD, J.

DATED: October 26, 2007

In this action for declaratory judgment, plaintiff Romark Associates seeks an order (1) vacating the Default Notice dated August 6, 2007 which pertains to the proprietary lease and stock for apartment 1J located at 833 Central Avenue, Far Rockaway, New York; (2) temporarily, preliminary and permanently enjoining defendants from terminating said lease or cancelling said shares of stock; (3) enjoining or tolling the time in which the plaintiff must cure any default in connection with the Default Notice, pending a determination of this action; (4) granting a preliminary injunction, enjoining defendants from acting in any manner, or disturbing, or interfering with plaintiff's rights to or in the subject apartment based upon the Default Notice; and enjoining defendants from commencing any legal action against plaintiff including, but not limited to, a summary proceeding in the Civil Court or other forum or otherwise attempting to recover possession of the apartment during the pendency of this action.

Plaintiff, Romark Associates, a partnership, was the sponsor of the cooperative conversion of a building located at 833 Central Avenue, Far Rockaway, New York. The building became a cooperative in 1984. Plaintiff is the proprietary lessee and holder of unsold shares of stock of apartment 1J, which is occupied by a rent-stabilized senior citizen, who receives Senior Citizen Rent Increase Exemption benefits (SCRIE). Plaintiff is

also the holder of the unsold shares to various other residential and commercial apartments located in said building. The subject building is owned by defendant 833 Central Avenue Owners Corp. In July 2005, defendant Benedict Realty Group LLC, became the managing agent for the subject building. Prior to that time, plaintiff's agent, Mark Greenberg Real Estate Co. LLC, was also the managing agent for the subject building. In this action for declaratory judgment, plaintiff seeks a declaration to the effect that it was entitled to deduct the sum of \$1,447.89 from its July 2007 maintenance payment, which was equal to the tax credit the building owner received as a result of the occupant's SCRIE benefits, pursuant to the Offering Plan. Plaintiff also seeks to vacate the notice of default, attorneys' fees, and injunctive relief.

That branch of plaintiff's motion which seeks to vacate the notice of default is denied. Plaintiff concedes that it is unable to properly challenge the right of the building owner's counsel to act as its agent as regards the notice of default. In addition, as the August 6, 2007 notice of default states that payment must be made "within the (10) days hereof" the time in which to cure is not ambiguous. Furthermore, plaintiff's reliance upon ATM One v Landaverde (2 NY3d 472 [2004]) is misplaced, as the notice of default was clearly addressed to Romark Associates, and not the rent-stabilized occupant of the apartment. Although the default notice was served by mail, as plaintiff is not a rent-stabilization tenant, the landlord is not required to set forth in

the notice an additional 5 days in which to cure the alleged default.

Plaintiff, in essence, seeks a Yellowstone injunction in order to preserve the status quo, pending the determination of this declaratory judgment action (see, First National Stores, Inc. v Yellowstone Shopping Center, Inc., 21 NY2d 630, [1968].) A Yellowstone injunction forestalls the cancellation of a lease in order to afford the tenant an opportunity to obtain a judicial determination of its breach, the measures necessary to cure it, and those required to bring the tenant in future compliance with the terms of the lease (see Waldbaum, Inc. v Fifth Ave. of Long Is. Realty Assoc., 85 NY2d 600, 606, [1995]). A tenant seeking Yellowstone relief must demonstrate that: (1) it holds a commercial lease, (2) it has received from the landlord a notice of default, a notice to cure, or a concrete threat to terminate the lease, (3) the application for a temporary restraining order was made prior to the termination of the lease, and (4) it has the desire and ability to cure the alleged default by any means short of vacating the premises (see Marathon Outdoor, LLC v Patent Constr. Sys. Div. of Harsco Corp., 306 AD2d 254, 255 [2003]; Long Is. Gynecological Servs. v 1103 Stewart Ave. Assoc. Ltd. Partnership, 224 AD2d 591, 593 [1996]).

Yellowstone injunctions have, on limited occasions, been issued to tenant-shareholders who have a cooperative proprietary lease (see, Post v 120 East End Ave. Corp., 62 NY2d 19 [1984]; Cohn v White Oak Cooperative Housing Corp., 243

AD2d 440 [1997]). Here, although plaintiff does not occupy the apartment, it is the lessee and shareholder, and thus stands to lose its lease and the equity it has as an owner in the event that the time to cure is not tolled. Plaintiff has demonstrated that it received the default notice from the building owner, that the motion for injunctive relief was made prior to the termination of the lease, and that it has the ability to cure the alleged default by any means short of vacating the premises, in the event that it is found in default of the lease. Therefore, that branch of plaintiff's motion which seeks to enjoin defendants, pending the determination of this action, from terminating the proprietary lease to the subject apartment and to toll the time in which to cure the alleged default is granted on condition that plaintiff post an undertaking in an amount to be fixed in the order to be entered hereon. Upon settlement of the order, parties may submit proof of recommendations as to the amount of the undertaking to be fixed. That branch of plaintiff's motion which seeks additional preliminary injunctive relief is denied, as these requests are repetitive and unnecessary.

That branch of plaintiff's motion which seeks permanent injunctive relief is denied. It is settled that absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment (see St. Paul Fire and Mar. Ins. Co. v York Claims Serv., 308 AD2d 347 [2003]).

Plaintiff has not demonstrated that such relief is warranted here.

Settle order.

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J.S.C.