[*1] Oleg Gorelik, Plaintiff, against Lazar Sobol, Polina Sobol, and Trump Village Section 3, Inc., Defendants.

18721/08

SUPREME COURT OF NEW YORK, KINGS COUNTY

2008 NY Slip Op 51725U*; *20 Misc. 3d 1134A*; *872 N.Y.S.2d 690*; *2008 N.Y. Misc. LEXIS 4712*; *240 N.Y.L.J. 41

August 14, 2008, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

CORE TERMS: apartment, constructive trust, injunction, tenant, preliminary injunction, waiting list, cure, housing, notice, co-op, lease, default, Mitchell-Lama Law, proprietary lease, cross-motion, illegally, knavery, rent, unjust enrichment, irreparable, ownership, landlord, caption, vacate, primary residence, termination, rascality, fiduciary, eviction, tenancy

HEADNOTES

[1134A]** Landlord and Tenant--Yellowstone Injunction. Trusts--Constructive Trust.

COUNSEL: [*1]** For Plaintiff: Thomas C. Lambert, Esq., Lambert & Schackman, PLLC, NY, NY; Dean M. Roberts, Esq. of Norris McLaughlin & Marcus, PA, New York, NY, represents defendant Trump Village Section 3, Inc.

For Defendant: Elliot S Martin, Esq., Brooklyn, NY, represents defendants Sobol & Sobol.

JUDGES: HON. ARTHUR M. SCHACK, J. S. C.

OPINION BY: Arthur M. Schack

OPINION

Arthur M. Schack, J.

Plaintiff's counsel wants the Court to impose a constructive trust, which would allow plaintiff to own a co-op apartment in Trump Village, Brooklyn. He asserts that the Court can impose a constructive trust as a remedy to "correct whatever knavery human ingenuity can invent." (*Simonds v Simonds, 45 NY2d 233, 241, 380 N.E.2d 189, 408 N.Y.S.2d 359 [1978]).* "Knavery" is defined as "rascality" (Webster's New Collegiate Dictionary 632 [1981]); while "rascality" is defined as "the character or actions of a rascal" (Webster's, *supra* at 950); and, a "rascal" is "a mean, unprincipled, or **[*2]** dishonest person" (Webster's, *supra* at 932). In the instant case, plaintiff GORELIK and the SOBOL defendants exhibited both knavery and rascality, with defendant

TRUMP VILLAGE SECTION 3, INC. (TRUMP), the innocent victim of their unprincipled and dishonest conduct.

Plaintiff, by order to show cause, **[***2]** seeks to enjoin the SOBOLS, his landlord, from evicting him from Apartment 15-B, 2915 West 5th Street, Brooklyn, New York. In his verified complaint, plaintiff asks for, in addition to a preliminary injunction to stop his eviction from the premises, a transfer of ownership of the co-op shares and proprietary lease for the apartment from the SOBOLS to him, because he alleges the existence of a constructive trust. Further, plaintiff wants "a *Yellowstone* type injunction" to enjoin defendant TRUMP from terminating his tenancy, pursuant to a July 30, 2008 default notice from TRUMP to the SOBOLS and the GORELIKS. The SOBOL defendants, by cross-motion, seek: an amendment of the caption to add plaintiff's wife, ANNA GORELIK, to the caption as an additional plaintiff; dismissal of the complaint, pursuant to *CPLR Rule 3211 (a) (7)*, for plaintiff's failure to state a cause of action; an order directing Mr. and Mrs. GORELIK to vacate the premises; and, cost and sanctions, pursuant to *22 NYCRR § 130-1.1*, for a "frivolous" action by plaintiff.

The SOBOLS did not create a constructive trust for the benefit of plaintiff. If the Court decided a constructive trust exists, it would reward plaintiff GORELIK **[***3]** for his knavery. Further, plaintiff does not merit a preliminary injunction in his favor and, with plaintiff not possessing a lease to rent Apartment 15-B, the Court will not grant him a "*Yellowstone* type injunction." Therefore, plaintiff's order to show cause is denied. All stays are vacated. The cross-motion of the SOBOLS is granted to the extent of: amending the caption to add Anna GORELIK as a plaintiff, dismissing plaintiff's complaint for failure to state a cause of action; and, directing plaintiffs to vacate the premises by October 1, 2008. The Court refuses to reward the knavery of the SOBOLS by imposing costs and sanctions upon plaintiff.

Background

It is undisputed that TRUMP was a "Mitchell-Lama" limited profit housing company (*Private Housing Finance Law [PHFL], Article II*), from the construction, in the Coney Island section of Brooklyn, of its residential co-op buildings in the 1960's until recently. The Court of Appeals noted, in *Schorr v New York City Department of Housing Preservation and Development (10 N.Y.3d 776, 777, 886 N.E.2d 762, 857 N.Y.S.2d 1 [2008])*, that:

> The Mitchell-Lama Law (*Private Housing Finance Law article II*) was enacted in 1955 to offer private housing companies the incentive to develop **[***4]** low-and moderate-income housing (see *Matter of KSLM-Columbus Apts, Inc., v New York State Div. of Hous, & Community Renewal, 5 NY3d 303, 308, 835 N.E.2d 643, 801 N.Y.S.2d 783 [2005]*. "The program encourages such housing by offering State and municipal assistance to developers in the form of long-term, low-interest government mortgage loans and real estate tax exemptions. In return for these financial benefits, developers agree to regulations concerning rent, profit, disposition of property and tenant selection" (*Matter of Columbus Park Corp. v Department of Hous. Preserv. & Dev. Of City of NY, 80 NY2d 19,* **[*3]** *23, 598 N.E.2d 702, 586 N.Y.S.2d 554 [1992]* [citations omitted].

TRUMP opted to remove the buildings from "Mitchell-Lama" restrictions and the co-operators voted in 2007 to end their "Mitchell-Lama" status. This allowed the shares for the apartments to be sold on the open market, for many times more than TRUMP sold them to the shareholders pursuant to "Mitchell-Lama" restrictions.

The SOBOLS, prior to 1998, purchased from TRUMP their "Mitchell-Lama" co-op shares and received a proprietary lease for Apartment 15-B, 2915 West 5th Street. Since 1998 the SOBOLS rented the apartment to plaintiff, who has lived there for almost ten years, with his wife and **[***5]** two children. Plaintiff is a month-to-month periodic tenant, without any lease. Plaintiff GORELIK paid the rent to the SOBOLS in cash each month. Plaintiff claims that: he ultimately learned that the apartment was a co-op; the envelopes slipped under the door and addressed to the SOBOLS each month was the maintenance bill; and, the rent he was paying to the SOBOLS each month was approximately twice the monthly maintenance.

Plaintiff received a thirty-day notice of termination from the SOBOL defendants, dated May 2, 2008, "to

terminate your tenancy . . . now held by you under monthly hiring." The SOBOLS gave plaintiff until June 30, 2008 to vacate the apartment, or else "the landlord [the SOBOLS] would commence summary proceedings . . . to remove you from said premises." Plaintiff, in his affidavit in support of the order to show cause, alleges that the SOBOLS threatened to remove his family by force from the apartment, and that on June 25, 2008, the SOBOLS changed the lock on the mailbox. Plaintiff complained to TRUMP's management on June 26, 2008, and said he was informed that since he is not the named shareholder for the apartment, TRUMP will not change the lock on the mailbox. Plaintiff **[***6]** informed TRUMP's management of the SOBOLS' Staten Island address that he alleges is their primary residence. Justice Gloria Dabiri, on June 27, 2008, signed the instant order to show cause, staying the eviction of the GORELIK family and allowing them access to the mailbox for Apartment 15-B, pending the hearing of the instant order to show cause for a preliminary injunction. TRUMP was named as a defendant to give the corporation notice and have them bound by any judgment.

Plaintiff, in P 19 of his affidavit in support of the order to show cause, after explaining that the SOBOLS illegally rented their "Mitchell-Lama" apartment to him, claims that "I am advised that because they did not occupy the Apartment themselves, they were required under the Mitchell-Lama Law to relinquish the Apartment so that it could be occupied by persons who need the protections of the Mitchell-Lama Law, middle-income people who needed a place to live, like me and my family." Then, in P 20 of his affidavit in support of the order to show cause, plaintiff accuses the SOBOLS of wrongfully scheming to retain Apartment 15-B until the co-op left the Mitchell-Lama program, and that since "the Apartment has become **[***7]** exempt from Mitchell-Lama they are seeking to reap the full benefits [of] this scheme by selling the Apartment on the open market and obtaining an undeserved profit. Therefore I am commencing this case to impose a constructive trust on the Apartment so that I can recover the value that I put into the Apartment."

I heard oral arguments on the instant order to show cause and the cross-motion, by counsel for plaintiff, the SOBOL defendants and defendant TRUMP, on August 8, 2008. Plaintiff's counsel argued that his client is an unsophisticated Russian immigrant, taken advantage of by a fellow Russian emigre. He argued that his client, to effectuate the spirit of the **[*4]** Mitchell-Lama Law, should receive Apartment 15-B by constructive trust, and be permitted to purchase the apartment at the 1998 Mitchell-Lama price, when the SOBOLS illegally rented to him.

Counsel for the SOBOLS argued that a constructive trust had never been created, and that to reward plaintiff GORELIK with ownership of the apartment would unjustly enrich plaintiff at the expense of the SOBOLS. Also, the SOBOLS' counsel argued that plaintiff is not as unsophisticated and naive as argued by his attorney. He presented a copy **[***8]** of plaintiff's business card, which states that OLEG GORELIK is a "Practice Support Analyst" at the Manhattan white-shoe law firm of Patterson Belknap Webb & Tyler, LLP.

TRUMP's counsel not only argued that a constructive trust had not been created for the benefit of plaintiff, but also explained that TRUMP would commence a separate action against the SOBOLS, to terminate their ownership of co-op shares and the proprietary lease for Apartment 15-B, for their almost ten-year violation of the Mitchell-Lama Law and New York City regulations for Mitchell-Lama housing. Further, TRUMP served a five-day notice to cure on the SOBOLS, giving them until August 11, 2008 to cure their defaults under their proprietary lease and applicable New York State Division of Housing and Community Renewal (DHCR) rules and regulations. The alleged defaults included illegally renting Apartment 15-B to plaintiff, an "unauthorized occupant," and not maintaining the apartment as their primary residence. To cure the default, TRUMP required the SOBOLS to permanently remove the "unauthorized occupants." Plaintiff's counsel argued orally, and in P 5 of his supplemental affirmation, that "the Goreliks are entitled to **[***9]** a *Yellowstone* type injunction tolling the cure period in order to preserve the *status quo* and preserve the Goreliks' claim to a valuable and unique long-term leasehold."

Grounds for a preliminary injunction *CPLR § 6301* states the grounds for a preliminary injunction and a temporary restraining order. A preliminary injunction "may be granted . . . when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor (*Grant Co. v Srogi, 52 NY2d 496, 517, 420 N.E.2d 953, 438 N.Y.S.2d*

761)." (*Doe v Axelrod, 73 N.Y.2d 748, 750, 532 N.E.2d 1272, 536 N.Y.S.2d 44 [1988])*. (*See Nobu Next Door, LLC v Fine Arts Housing, Inc., 4 NY3d 839, 833 N.E.2d 191, 800 N.Y.S.2d 48 [2005]*; *Aetna Ins. Co. v Capasso, 75 NY2d 860, 862, 552 N.E.2d 166, 552 N.Y.S.2d 918 [1990]*; *Ricca v Ouzounian, 51 AD3d 997, 859 N.Y.S.2d 238 [2d Dept 2008]*; *Kelley v Garuda, 36 A.D.3d 593, 827 N.Y.S.2d 293 [2d Dept 2007]*; *Cedar Graphics Inc. v Long Island Power Authority, 35 AD3d 337, 826 N.Y.S.2d 396 [2d Dept 2006]*; *Lattingtown Harbor Property Owners Ass'n. Inc. v Agostino, 34 A.D.3d 536, 825 N.Y.S.2d 86 [2d Dept 2006]*; *McNeil v Mohammed, 32 AD3d 829, 821 N.Y.S.2d 225 [2d Dept 2006]*; *Coinmach Corp. v Alley Pond Owners Corp, 25 AD3d 642, 808 N.Y.S.2d 418 [2d Dept 2006])*.

An injunction is a provisional remedy **[***10]** to maintain the *status quo* until a full hearing can be held on the merits of an action. As such "[t]he decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court." (*City of Long Beach v Sterling American Capital, LLC, 40 AD3d 902, 837 N.Y.S.2d 572 [2d Dept 2007])*. (*See Doe v Axelrod, at 750*; *Automated Waste Disposal, Inc. v Mid-Hudson Waste, Inc., 50 AD3d 1072, 857 N.Y.S.2d 648 [2d Dept 2008]*; *Glorious Temple Church of God in Christ v Dean Holding Corp., 35 AD3d 806, 828 N.Y.S.2d 442 [2d Dept 2006]*; *Cedar Graphics Inc. v Long Island Power Authority, at 339*; *Ruiz v Meloney, 26 A.D.3d 485, 810 N.Y.S.2d 216 [2d Dept 2006]*; *Pouncy v Dudley, 27 A.D.3d 633, 814 N.Y.S.2d 641 [2d Dept 2006]*; *Coinmach Corp. v Alley Pond Owners Corp, supra*).

[*5] In *Related Properties, Inc. v Town Bd. of Town/Village of Harrison (22 AD3d 587, 590, 802 N.Y.S.2d 221 [2d Dept 2005])*, the Court instructed that:

> Since a preliminary injunction prevents litigants from taking actions that they would otherwise be legally entitled to take in advance of an adjudication on the merits, it is considered a *drastic remedy which should be issued cautiously* (*see Uniformed Firefighters Assn. of Greater NY v City of New York, 79 N.Y.2d 236, 241, 590 N.E.2d 719, 581 N.Y.S.2d 734 [1992]*; *Gagnon Bus Co. Inc. v Vallo Transp. Ltd., 13 AD3d 334, 786 N.Y.S.2d 107 [2004]*; **[***11]** *Bonnieview Holdings v Allinger, 263 AD2d 933, 693 N.Y.S.2d 340 [1999])*. [*Emphasis added*]

Because injunctive relief is drastic, the party seeking "a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts upon the moving papers (*see William M. Blake Agency, Inc. v Leon, 283 AD2d 423, 723 N.Y.S.2d 871 [2d Dept 2001])*." (*Gagnon Bus Co., Inc., at 335*). (*See Peterson v Corbin, 275 AD2d 35, 713 N.Y.S.2d 361 [2d Dept 2000]*; *Brand v Bartlett, 52 AD2d 272, 383 N.Y.S.2d 668 [3d Dept 1976])*.

Further, the movant for injunctive relief "must demonstrate a clear right to relief which is plain from the undisputed facts." (*Blueberries Gourmet v Aris Realty Corp., 255 AD2d 348, 350, 680 N.Y.S.2d 557 [2d Dept 1998]*, citing *Family Haircutters v Detling, 110 AD2d 745, 747, 488 N.Y.S.2d 204 [2d Dept 1985])*. (*See JDOC Construction, LLC v Balabanow, 306 AD2d 318, 760 N.Y.S.2d 678 [2d Dept 2003]*; *Dental Health Associates v Zangeneh, 267 AD2d 421, 701 N.Y.S.2d 106 [2d Dept 1999])*.

The claims of a plaintiff that harm is imminent and irreparable must be clearly demonstrated to the Court. When claims "are wholly speculative and conclusory," they "are insufficient to satisfy the burden of demonstrating irreparable injury." (*Khan v State University of New York Health Science Center at Brooklyn, 271 AD2d 656, 706 N.Y.S.2d 192 [2d Dept 2000])*. **[***12]** "The irreparable harm must be shown by the moving party to be imminent, not remote or speculative." (*Golden v Steam Heat, Inc. 216 AD2d 440, 442, 628 N.Y.S.2d 375 [2d dept 1995])*. (*See Village/Town of Mount Kisco v Rene Dubos Center for Human Environments, Inc., 12 AD3d 501, 784 N.Y.S.2d 628 [2d Dept 2004]*; *Neos v Lacey, 291 AD2d 434, 737 N.Y.S.2d 394 [2d Dept 2002])*.

Failure to prove the existence of a constructive trust

Therefore, for the Court to determine if plaintiff GORELIK has a likelihood of ultimate success on the merits, the Court has to determine if a constructive trust has been created for plaintiff's benefit by the SOBOLS. A constructive trust is an equitable remedy, described by Judge Benjamin Cardozo as "the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the

beneficial interest, equity converts him into a trustee." (*Beatty v Guggenheim Exploration, Co., 225 NY 380, 122 N.E. 378 [1919])*. "In the development of the doctrine of constructive trust as a remedy available to courts of equity, the following four requirements were posited: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer **[***13]** in reliance thereon and (4) unjust enrichment. (*Sharp v Kosmalski, 40 N.Y.2d 119, 121, 351 N.E.2d 721, 386 N.Y.S.2d 72 [1976])*. (*See Simonds v Simonds, at 241-242*; *McGrath v Hilding, 41 NY2d 625, 628-629, 363 N.E.2d 328, 394 N.Y.S.2d 603 [1977]*; *A.G. Homes, LLC v Gerstein, 52 A.D.3d 546, 860 N.Y.S.2d 582 [2d Dept 2008]*; *Williams v Eason, 49 A.D.3d 866, 854 N.Y.S.2d 477 [2d Dept 2008]*; *O'Brien v Dalessandro, 43 A.D.3d 1123, 843 N.Y.S.2d 348 [2d Dept 2007])*.

In the instant action it is clear that there is no fiduciary relationship between the **[*6]** GORELIKS and the SOBOLS. The Court of Appeals, in *EBC 1, Inc. v Goldman, Sachs & Co. (5 NY3d 11, 19-20, 832 N.E.2d 26, 799 N.Y.S.2d 170 [2005])*, held:

> A fiduciary relationship "exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (*Restatement [Second] of Torts § 874, Comment a*). Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions (see *Northeast Gen. Corp. v Wellington Adv., 82 NY2d 158, 162, 624 N.E.2d 129, 604 N.Y.S.2d 1 [1993])*. Generally, where parties have entered into a contract, courts look to that agreement "to discover . . . the nexus of [the parties'] relationship and the particular **[***14]** contractual expression establishing the parties' interdependency" (see *id. at 160*). "If the parties . . . do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them" (*id. at 162*).

The Appellate Division, First Department, applying the above holding, instructed that "[a] fiduciary relationship does not exist between parties engaged in an arm's-length business transaction . . . which is normally the situation between landlord and tenant." (*Dembeck v 220 Central Park South, LLC, 33 A.D.3d 491, 823 N.Y.S.2d 45 [1d Dept 2006])*. Plaintiff GORELIK had a periodic, month-to-month tenancy with the SOBOLS. This is a business transaction between unrelated parties. No evidence has been presented of any trust or confidence placed by plaintiff in the SOBOLS.

Further, no evidence has been presented of any promise, expressed or implied, made by the SOBELS to plaintiff, that the GORELIKS could purchase the apartment from them. Additionally, when Apartment 15-B was subject to Mitchell-Lama regulations, if it were sold, TRUMP would sell it to the next qualifying potential shareholder on the waiting list, which **[***15]** would not have been the GORELIKS. (*28 RCNY § 3-06*). Granting a constructive trust to the GORELIKS would negate the lengthy Mitchell-Lama waiting list, and be unfair to the numerous people who lawfully waited for years to purchase their Mitchell-Lama apartments.

Next, no transfer of the corpus of the alleged trust, the shares of ownership in the co-op corporation, has taken place. Plaintiff has made no allegation that any transfer of the SOBOL shares, in reliance thereupon or otherwise, has taken place. The GORELIKS were the tenants of the SOBOLS and never had an ownership interest in the co-op. With respect to the last element of a constructive trust, unjust enrichment, plaintiff would have to allege that the SOBOLS were unjustly enriched at the expense of plaintiff. It is insufficient to assert that the **[*7]** SOBOL defendants wrongfully benefitted from their actions and it adversely affected plaintiffs. The Court of Appeals, in *McGrath v Hilding, at 629*, held:

> Enrichment alone will not suffice to invoke the remedial powers of a court of equity. Critical is that under the circumstances and as between the two parties to the transaction the enrichment be unjust. (*Restatement, Restitution, § 1, Comments a,* **[***16]** *c*; see, generally, 5 Scott, Trusts [3d ed], § 462.2.). Hence, whether there is unjust enrichment may not be determined from a limited inquiry confined to an isolated transaction. It must be a realistic determination based on a

> broad view of the human setting involved (cf. *Sinclair v Purdy, 235 NY 245, 254, 139 N.E. 255*; *Janke v Janke, 47 AD2d 445, 448, 366 N.Y.S.2d 910, affd, 39 NY2d 786, 350 N.E.2d 617, 385 N.Y.S.2d 286*).

The fact that the SOBOLS illegally rented Apartment 15-B to plaintiff at double the monthly maintenance is not unjust enrichment at the expense of the GORELIKS, but could possibly be unjust enrichment at the expense of TRUMP. Wherever the GORELIKS lived, they would have to pay rent, maybe at a higher amount than what they paid to the GORELIKS.

If the Court were to grant the GORELIKS' claim that they should be able to purchase the apartment at the 1998 Mitchell-Lama rate, it would unjustly enrich the GORELIKS at the expense of TRUMP. Shares of Trump Village stock now sell at the market price. If the SOBOLS lose their shares and apartment to TRUMP, for their Mitchell-Lama violations, TRUMP will sell the shares for Apartment 15-B at the market price. If the GORELIKS were on a TRUMP waiting list, while Apartment 15-B was subject to Mitchell-Lama **[***17]** regulation, and then found to have illegally occupied Apartment 15-B, they would have been removed from the waiting list. (*28 RCNY § 3-02 [h] [13]*). The November 12, 2003 Historical Note 2 to *28 RCNY § 3-02*, with respect to the 2003 amendment of *28 RCNY § 3-02 (h)*, which was subsequently approved, states:

> The proposed amendment to *28 RCNY § 3-02 (h)* provides that a waiting list applicant who occupies a Mitchell-Lama apartment in that development in violation of the rules while he or she is on such waiting list shall be removed from such waiting list. Mitchell-Lama apartments are highly desirable and in scarce supply. Persons who illegally occupy such units should not be able to "legalize" their occupancy by thereafter assuming their places on the waiting list.. This is tantamount to rewarding such persons for violating the program's restrictions.

The Court will not engage in rewarding the GORELIKS "for violating the program's restrictions."

[*8] Mitchell-Lama violations

It is clear that the SOBOLS violated the Mitchell-Lama law and regulations, as well as their proprietary lease, by not using Apartment 15-B as their primary residence and renting it to the GORELIKS. Limited profit housing companies **[***18]** are allowed to set up regulations to put into effect the Mitchell-Lama Law. (*PHFL §§ 32* and *32-a*). *28 RCNY §3-02* deals with the rental or sale of space in "limited profit housing companies" in New York City, such as TRUMP, when it was subject to Mitchell-Lama. *28 RCNY § 3-02 (h)* has a myriad of rules involved with waiting lists for prospective purchasers to receive a Mitchell-Lama apartment, and *28 RCNY § 3-02 (k)* deals with income verification for those on the waiting list. There is no evidence that the GORELIKS were ever on a waiting list for any TRUMP apartment and no evidence that they ever provided income verification documentation to TRUMP. Further, the SOBOLS were in violation of: *28 RCNY § 3-02 (n) (2)*, in that "[n]o tenant/cooperator shall have the right to sublet without prior written approval of HPD and the housing company, which only shall be given in exceptional circumstances, including, but not limited to, military service;" and, *28 RCNY § 3-02 (n) (4)*, in that "[i]t is required that the apartment of the tenant/ cooperator be at initial occupancy and continue to be his or her primary place of residence." The Court will not allow the GORELIKS, who were not on any TRUMP **[***19]** waiting list, to benefit from the SOBOLS' violations of the Mitchell-Lama law and regulations.

Plaintiff's legal *chutzpah*

The 1998 Mitchell-Lama price for purchase of the shares for Apartment 15-B is a mere fraction of what the shares are now worth on the open market. To allow the GORELIKS to purchase the shares at the 1998 Mitchell-Lama price, would give them the ability to flip the shares at present market value and earn a windfall of several hundred thousand dollars. Plaintiff's outlandish claim that he should be able to purchase the apartment at the 1998 Mitchell-Lama price is nothing more than legal *chutzpah.*

Therefore, without the existence of a constructive trust, and the likelihood of plaintiff's success on the merits nonexistent, the Court denies a preliminary injunction to plaintiff GORELIK. Also, the denial of a preliminary injunction to plaintiff is not irreparable injury since plaintiff will only be inconvenienced in finding a new residence. Lastly, the equities do not tip in plaintiff's

favor.

Granting of cross-motion to dismiss plaintiff's complaint

Further, the Court, in analyzing the SOBOLS's cross-motion to dismiss, must liberally construe the pleadings and accept the **[***20]** facts as alleged in the complaint as true, in determining if the alleged facts fit into any cognizable legal theory. (*Leon v Martinez, 84 NY2d 83, 87, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]*; *Morone v Morone, 50 NY2d 481, 484, 413 N.E.2d 1154, 429 N.Y.S.2d 592 [1980]*; *Guggenheimer v Ginzburg, 43 N.Y.2d 268, 275, 372 N.E.2d 17, 401 N.Y.S.2d 182 [1977]*; *Doria v Masucci, 230 AD2d 764, 765, 646 N.Y.S.2d 363 [2d Dept 1996]*. The Court's evaluation of the pleadings and acceptance of the facts as alleged by plaintiff, does not prove the existence of a constructive trust. Therefore, the complaint is dismissed. Additionally, the caption will be amended to add Mrs. ANNA GORELIK as an additional plaintiff, to prevent her from bringing a similar action for the same requested relief.

Denial of *Yellowstone* injunction

[*9] With respect to the July 30, 2008 Five Day Notice to cure from TRUMP to the SOBOLS and the GORELIKS, TRUMP put the parties on notice that SOBOLS defaulted on their proprietary lease by renting to the GORELIKS without the prior written consent of TRUMP, and collected rents in violation of DHCR rules and regulations. TRUMP gave the SOBOLS until August 11, 2008 to remove the GORELIKS, "the unauthorized occupants. TRUMP also put the SOBOLS on notice that they have not lived in Apartment 15-B as their primary **[***21]** residence, as required, and have lived at a Staten Island address for more than ten years.

Plaintiff seeks a *"Yellowstone* type injunction," claiming that if the *status quo* is not maintained and the time to cure tolled, the GORELIKS will not be able to preserve their claim to Apartment 15-B. However, plaintiffs do not meet the standard for granting a *Yellowstone* injunction, as set forth in *First National Stores, Inc. v Yellowstone Shopping Center, Inc. (21 NY2d 630, 237 N.E.2d 868, 290 N.Y.S.2d 721 [1968]*, and recently articulated by the Appellate Division, Second Department, in *Hopp v Raimondi (51 A.D.3d 726, 858 N.Y.S.2d 300 [2008])*:

> The purpose of a *Yellowstone* injunction is to allow a tenant confronted by a threat of *termination of the lease* to obtain a stay tolling the running of the cure period so that after a determination on the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold (*see Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc., 93 N.Y.2d 508, 514, 715 N.E.2d 117, 693 N.Y.S.2d 91 [1999]*; *Post v 120 E. End Ave. Corp., 62 NY2d 19, 464 N.E.2d 125, 475 N.Y.S.2d 821 [1984]*. Although Yellowstone injunctions are more commonly sought to protect a tenant's interest in a commercial lease (*see Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc., 93 NY2d 508, 514 [1999]*), **[***22]** *Yellowstone* relief also has been granted to residential tenants (*see Post v 120 E. End Ave. Corp., 62 NY2d 19, 464 N.E.2d 125, 475 N.Y.S.2d 821 [1984]*; *Kuttas v Condon, 290 AD2d 492, 736 N.Y.S.2d 402 [2d Dept 2002]*; *Cohn v White Oak Coop. Hous. Corp., 243 AD2d 440, 663 N.Y.S.2d 62* [2 Dept 1997]; *Somekh v Ipswich House, 81 AD2d 662, 438 N.Y.S.2d 362 [2d Dept 1981]*; *Wuertz v Cowne, 65 AD2d 528, 409 N.Y.S.2d 232 [1st Dept 1978]*. [*Emphasis added*]

The party seeking the *Yellowstone* injunction must demonstrate (*Hempstead Video, Inc. v 363 Rockaway Associates, LLP, 38 AD3d 838, 839, 833 N.Y.S.2d 144 [2d Dept 2007])*:

> that: (1) it holds a commercial lease, (2) it has received from the landlord a notice of default, notice to cure, or threat of termination of the lease, (3) its application for a temporary restraining order was made prior to expiration of the cure period and termination of the lease, and (4) it has the desire and ability to cure the alleged default by any means short of vacating the premise

[*10] (*See First National Stores, Inc. v Yellowstone Shopping Center, Inc., supra; Xiotis Restaurant Corp v LSS Leasing Limited Liability Company, 50 AD3d 678, 855 N.Y.S.2d 578 [2d Dept 2008]*; *Gihon, LLC v 501*

Second Street, LLC, 306 AD2d 376, 761 N.Y.S.2d 276 [2d Dept 2003]; *King Party Center of Pitkin Avenue, Inc. v Minco Realty, LLC, 286 AD2d 373, 729 N.Y.S.2d 183 [2d Dept 2001]*; **[***23]** *Mayfair Supermarkets, Inc. v Serota, 262 AD2d 461, 692 N.Y.S.2d 415 [2d Dept 1999]*

Step One for a defaulting tenant to secure a *Yellowstone* injunction is to have a lease. The GORELIKS are month-to-month tenants. They do not have a lease. Further, they cannot cure the default unless they vacate the premises. This is not allowed in granting a *Yellowstone* injunction. Since the GORELIK plaintiffs will be unable to prevail on the merits of their constructive trust claim to Apartment 15-B, the Court will not reward plaintiffs for their illegal tenancy and grant them a *Yellowstone* injunction.

However, to give the GORELIKS a reasonable period of time to vacate Apartment 15 B, 2915 West 5th Street, Brooklyn, New York, the Court will stay the surrender of the apartment by the GORELIK family until October 1, 2008.

This Court will not be a party to rewarding the knavery and rascality demonstrated by both the GORELIKS and the SOBOLS, as well as legal *chutzpah* of the GORELIKS.

Conclusion

Accordingly, it is

ORDERED, that plaintiff OLEG GORELIK's order to show cause for a preliminary injunction to prevent his eviction from Apartment 15-B, 2915 West 5th Street, Brooklyn, New York 11224, is denied; and it is further

ORDERED, **[***24]** that the cross-motion of defendants LAZAR SOBOL and POLINA SOBOL is granted to the extent that: the caption of the instant action is amended to:

the complaint of plaintiffs' OLEG GORELIK and ANNA GORELIK is dismissed; and, defendants LAZAR SOBEL and POLINA SOBOL are entitled to immediate possession of Apartment 15-B, 2915 West 5th Street, Brooklyn, New York 11224; and it is further

ORDERED, that to give plaintiffs OLEG GORELIK and ANNA GORELIK sufficient time to find a new residence, their eviction from Apartment 15-B, 2915 West 5th Street, Brooklyn, New York 11224 is stayed until October 1, 2008.

This constitutes the decision and order of the Court.

ENTER

HON. ARTHUR M. SCHACK

J. S. C.