

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 2

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DAILY BREAD CAFÉ INC.,		MOTION SEQ. NO. 2
Plaintiff,		BY: WEISS, J.
- against -		DATED: November 7, 2007
CITY LIGHTS AT QUEENS LANDING INC.,		
Defendant.		
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In this action for specific performance and declaratory relief, plaintiff seeks to enjoin defendant from 1) terminating its leasehold interest, 2) interfering with its right to possession of the premises, 3) proceeding with a pending Civil Court, Queens County summary holdover proceeding entitled City Lights at Queens Landing, Inc. v Daily Bread Café, Inc., (L&T Index No. 68419/07) and also moves for consolidation of the Civil Court matter with this action.

This controversy arises out of a commercial lease dated January 16, 2003 in which plaintiff was given a 10-year lease to occupy a portion of the ground floor of premises located at 4-47 48th Avenue in Long Island City, New York. The leased space was unimproved, requiring plaintiff to "build out" the premises at its sole cost and expense. The executed agreement does not provide a date certain for the commencement of the lease term. Under

paragraph 90 of the lease, plaintiff's tenancy was expressly subject to the consent of the holder of the ground lease, with the term of the lease commencing after all consents were obtained. Plaintiff's obligation to begin the process for alterations would be triggered "immediately after the Commencement Date and shall thereafter be completed not later than four (4) months after the Commencement Date." (Para 81[a].) Defendant's cooperation was mandated under paragraph 81(d) of the lease, to permit plaintiff to obtain all necessary building permits and approvals. During the 4-month period following the commencement date plaintiff was given a fixed rent concession. (Para 49.) On or about June 26, 2003, approval of the lease by the Co-op Board was apparently granted.

It is plaintiff's contention that it promptly submitted building plans to the Department of Buildings (DOB) in July 2003 but was delayed due to defendant's uncooperative conduct in refusing to provide information and timely approving necessary changes as required by the City of New York. Upon eventually receiving approval from the DOB in June 2004, it is asserted that despite numerous requests, access was unreasonably withheld by defendant, resulting in the premises remaining vacant. Plaintiff further states that no demands for rent were made by defendant at anytime.

Defendant served a 15-day notice of default dated May 21, 2007 holding plaintiff in violation of lease provisions 17(1) and

41(f) by allowing the premises to become "vacant or deserted and/or have abandoned the premises and/or discontinued normal operations for the permitted use under the Lease...for more than one week." A notice of termination was, thereafter, served effective June 14, 2007.

The court notes that the relief sought herein is not a Yellowstone injunction but rather a preliminary injunction which requires satisfaction of traditional criteria which include, a likelihood of success on the merits, the balancing of equities and irreparable harm. (Aetna Ins. Co. v Capasso, 75 NY2d 860 [1990]; Gerstner v Katz, 38 AD3d 835 [2007].) While defendant's contention that the lease commenced upon execution is clearly contradicted by the explicit terms of the document, the actual conduct of the parties in fulfilling their contractual obligations cannot adequately be assessed upon the submissions to this court. However, the failure to enjoin plaintiff's eviction from the premises may render a later judgment in its favor ineffectual. (See, Ruiz v Melonex, 26 AD3d 485 [2006].) Additionally, paragraph 91(g) of the lease limits plaintiff's remedies in matters pertaining to the landlord's reasonable exercise of judgment and withholding of consent or approvals to, "those in the nature of injunction, declaratory judgment or specific performance, the right to money damages or other remedies being hereby specifically waived." As a result of the foregoing, the balancing of equities

and the avoidance of irreparably harm requires the preservation of the status quo pending a resolution of the issues. (See, Coinmach Corp. v Alley Pond Owners Corp., 25 AD3d 642 [2006]; Reuschenberg v Town of Huntington, 16 AD3d 568 [2005]; cf., Copart of Connecticut v Long Is. Auto Realty, LLC, 42 AD3d 420 [2007].)

Accordingly, a preliminary injunction is granted solely to the extent of staying defendant, its agents and employees from taking any action to interfere with plaintiff's leasehold interest and from pursuing summary eviction proceedings against plaintiff during the pendency of this action. The foregoing is conditioned upon plaintiff filing an undertaking in accordance with CPLR 6312. Upon settlement of the order, the parties may submit proof and recommendations as to the amount of the undertaking.

All other requests for relief are denied.

Settle order.

J.S.C.