Sutton Madison, Inc. v 27 East 65th Street Owners Corp.
2002 NY Slip Op 30105(U)
June 25, 2002
Supreme Court, New York County
Docket Number: 103980/02
Judge: Shirley Werner Kornreich

[* 1]

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

PRESENT: Kornreich Justice PART 54

Sutton Madison

- v -

27 E 65 St Owners

INDEX NO. 163980/02

MOTION DATE 6/20/02

MOTION SEQ. NO. 1

MOTION CAL. NO. —

The following papers, numbered 1 to 4 were read on this motion to/for Injunction/dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3-4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion by plaintiff and cross-motion by defendant are decided in accordance with the annexed Decision, Order and Judgment.

SCANNED

JUL 02 2002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: June 25, 2002

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
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SUTTON MADISON, INC.,

Plaintiff, Index No.: 103980/02

-against- **DECISION, ORDER and JUDGMENT**

27 EAST 65TH STREET OWNERS CORP.,

Defendant.
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KORNREICH, SHIRLEY WERNER, J.:

Plaintiff and defendants are cotenants pursuant to a ground lease affecting a 14-story building located at 27 East 65th Street, New York, New York, on the corner of 65" Street and Madison Avenue. The first floor, which is leased from the owner by plaintiff ("plaintiff' or "Sutton"), is occupied by several subtenant retail stores, including a branch of Citibank, a women's clothing store called "Vertigo," an optician's shop known as "Oliver Peoples," a garage, and a restaurant known as Ferrier. Ferrier is 50% owned by the principals of plaintiff, Elliott and Irving Sutton. The upper stories of 227 East 65" Street consist of residential apartments controlled by defendant 27 East 65" Street Owners Corp. ("defendant" or "27"), a cooperative corporation.

On February 20, 2002, 27's engineer, Eugene Ferrara, filed a "Local Law 11"report regarding the crumbling condition of the blue glazed bricks which make up the facade of the residential portion of the building. According to Mr Ferrara, such bricks, which were popular in the 1960's, are susceptible to problems caused by water penetration and retention. Plaintiffs expert has not refuted these assertions. Unlike standard red bricks, which are porous and allow

water to exit, such blue bricks retain water behind their glazing. Mr Ferrara goes on to related how, after decades of successive freezing and thawing, contracting and expanding, glazed bricks begin to crack, chip, bow, sag, and, in some cases, fall off the building. Defendant has submitted numerous photographs showing "waving," bowing and bulging of the blue glazed bricks across large tracts of the exterior walls of the residential portion of 27 East 65" Street.

On March 4, 2002, or within ten days of receiving 27's report, the New York City Department of Buildings served a notice of violation on defendant. In response to this notice, and in compliance with the requirements of Local Law 11 (New York City Administrative Code Sec. 27-129), defendant erected a scaffold around the building. The law requires that such scaffolding be constructed to protect the public from any unsafe condition on a building face, and that the protective scaffolding must remain in place until all repairs on the building walls are completed. See New York Administrative Code Sec. 27-2021[a][2] and [a][5]. Although the statute provides that a repair should be completed within 30 days, it allows for extensions of time based upon an architect's or engineer's projection regarding how much time is needed to render the facade safe.

In light of defendant's engineer's estimate that 40-65% of the bricks and other exterior components of the instant building had to be replaced, 27 decided to "reskin" the entire facing with traditional, porous red bricks - a move which would not only cure the current problems but would prevent future ones. Defendant's expert estimates that this task can be accomplished in roughly two years, at a cost of $3-$3.5 million - a sum that can be raised through a refinancing of the cooperative's mortgage. In embarking on this course, defendant has taken into consideration the fact that there is currently only one maker of blue-glazed bricks left in the entire United States,

and that its Western Pennsylvania factory is soon scheduled to be shut down for several months for retooling. Moreover, it is 27's engineer's considered opinion that the "replacement" of only the most damaged blue bricks - which would entail "matching" some 40,000 bricks in size, shape and color - would prove more costly and time-consuming than would simply "reskinning" the entire facing with readily available red bricks.

When Sutton learned of 27's plans, it commenced the instant action, and also moved to enjoin 27 from proceeding with its proposed comprehensive refacing. According to Sutton, a complete "reskinning" would take at least three years, during which time Sutton's commercial tenants would lose business. According to plaintiff, it is well known that "pedestrians, shoppers and diners [tend to] avoid the area under ... Scaffolding." Sutton postulated that such a loss in revenues could drive Sutton's commercial tenants out of business, and no new subtenants would be willing to replace them under the scaffold. Plaintiff goes so far as to conjecture that 27 has deliberately manufactured the instant situation in order to force Sutton into defaulting so that 27 can appropriate the ground floor lease. Plaintiff further anticipates that defendant will not be able to acquire enough funds to complete the work, or, in the alternative, that its acquisition of funds will take an inordinately long time. Plaintiff protests that it does not want to have to loan defendant money, as it has been forced to do in the past, to prevent a possible foreclosure by defendant's lender and incalculable potential damage to defendant's leasehold. Plaintiff contends that by "replacing every brick in the building," defendant is violating Paragraph 6.1 of 27's "Reciprocal Agreement" with Sutton, according to which each tenant could freely undertake alterations to its portion of the building provided that such alterations "shall not ... diminish the benefits afforded to [the] other owner ... or interrupt such other Owner's use of' its property.

Plaintiff's engineer, Richard Koenigsberg, inspected the facade of the residential building "by telescopic lens and photography" on March 28,2002. It is his impression that less than 20% of the bricks needed repair or replacing. According to him, such isolated repairs would cost under $1 million and take less than a year. Koenigsberg recommends that defendant acquire its replacement blue glazed bricks from a manufacturer in Loughborough, England. Bricks that have lost their "tiebacks" can be stabilized by the insertion of quick and inexpensive "Helifix anchor pins" and similar patching. Generally, Koenigsberg questions whether defendant's photographs are not just of the worst sections of the facade rather than representative of the entire building. He goes on to suggest that the "waviness" of horizontal brick-sequences apparent in defendant's photographs is not the result of brick failure, but rather is an "optical illusion'' caused by a "stripped pattern of alternating lighter and darker bands" of blue bricks. He concludes that there is "absolutely no need to reskin the entire building," when the replacement and repair of individual bricks can be done faster and more cheaply.

Plaintiff asks the Court to enjoin defendant from installing scaffolding and from undertaking a "reskinning" of the entire building. It requests that this Court direct defendant to replace only the failed bricks and to repair the less damaged ones, all within 90 days. Defendant cross-moves to dismiss the complaint.

It is well established that an applicant for injunctive relief must demonstrate (1) the likelihood of success on the merits, (2) a balancing of the equities in its favor, and (3) irreparable injury if the injunction is not granted. See W.T. Grant Co. v. Sroni, 52 N.Y.2d 496,517 (1981); Atlantis Worldwide Ltd. v. Benitez, 290 A.D.2d 379 (1st Dept. 2002). Plaintiff has not carried its burden on any of these essential showings.

The law requires that failing brickwork of the sort at issue here must be repaired, and that for the duration of the repair work a scaffold must be maintained to protect pedestrians from falling masonry due to either decay or construction. Accordingly, plaintiff has no likelihood of succeeding on the merits of its application for a permanent injunction against the erection of any scaffold. The Court notes that, in any event, the scaffold has already been put up, in accordance with the law, with the result that so much of plaintiffs application as seeks to prevent the installation of the scaffold in the first instance is moot.

Secondly, the equities weigh in favor of defendant. Balanced against defendant's concern for the physical preservation of its property, for the protection of pedestrians and for compliance with the law are plaintiffs comparatively speculative worries that its commercial subtenants' revenues might suffer or that defendant may not be able to afford the entire "reskinning." Plaintiffs ultimate anxiety is that one or the other of these anticipated shortfalls could cost plaintiff money at some unspecified date in the future. Clearly, defendant's real concerns, and their gravity, outweigh plaintiff's conjectural and purely monetary apprehensions.

Nor do the equities favor plaintiffs choice of remedy. Aside from the fact that plaintiff has no authority to dictate how defendant should best repair its leasehold, the evidence in the record supports defendant's calculation that a complete "reskinning" of the building in red brick is the most cost-effective way to correct its current brick-work problems while obviating future ones. Moreover, it does not appear that it would take much longer, if at all, to redo the entire exterior than to, e.g., replace individual bricks - particularly if the replacements must be transported across the Atlantic.

The Court rejects plaintiff's expert's other "patching" recommendations as inadequately

supported. Mr. Koenigsberg visited the subject building on only one occasion, and merely photographed it from afar. He did not take any probes, did not review the results of any probe tests, did not participate in "up-close" inspections, did not review the reports of 27's engineering consultants, and did not discuss 27's engineers' analyses with them. Rather, he has contented himself with questioning whether the sagging and "waviness" along the horizontal brick lines - which, complete with bulging bricks, are clearly visible in defendant's photographs - might be due not to a movement of walls due to a failure of bricks and compression of mortar, but rather to a harmless optical "illusion" created by alternations of pale and dark bricks. In the context of the photographs before the Court, such a suggestion is little short of irresponsible - as is Mr. Koenigsberg's further proposal that the crumbling glazed bricks which are not replaced with new bricks manufactured in England can be simply skewered into place with Helifix pins.

Finally, plaintiff has not indicated what "irreparable harm" it would suffer from defendant's repairs that would justify a grant of an injunction. Rather, it would seem that any harm to plaintiff will occur, if at all, at some time in the future, at which point plaintiff may, if it be so advised, commence a different action against defendant for compensation in the form of money damages.

Accordingly, it is

ORDERED that plaintiffs motion for a preliminary injunction is denied; and it is further

ORDERED that defendant's cross-motion to dismiss is granted and the complaint is dismissed, without prejudice to plaintiffs bringing an action in future if appropriate circumstances warrant, with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing constitutes the Decision, Order and Judgment of the Court.

Date: June 25,2002
New York, New York

SHIRLEY WERNER KORNREICH