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

PRESENT: HON. JUDITH J. GISCHE Justice

PART 10

FERDRICH LLC

- v -

Lin Broadcast

INDEX NO. 600820/05

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED

JUN - 7 2005

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

Dated: 5/27/05

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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Fernbach, LLC,.

Plaintiff,

-against-

Sun Collector US I Inc., and
SK Cartoleria Ltd., d/b/a
Hyde Park Stationers,

Defendants.

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DECISION/ORDER
Index No.: 600320/05
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pl's OCS w/aff (NG), exhs.	1
Def's Aff in Op (TP) w/SS aff, RB aff, RSL affirm, exhs. . .	2
Pl's Reply Aff (CWJ)	3
Def's Affirm in Op (RSL) w/FG aff, RB aff	4
Pl's Reply Aff (ST) w/exhs.	5
Def's Vilebrequin folder exh	6

Gische, J.

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for a declaratory judgment, specific performance, injunctive relief and compensatory damages against both defendants. Plaintiff seeks summary judgment against both tenants on all causes of action, except those seeking compensatory damages. It also seeks a preliminary injunction, permitting it to move forward with certain construction that is at the core of the parties' dispute.

Plaintiff is the owner/landlord of the building located at 1070 Madison Avenue, New York County ["the building"]. Defendant Sun Collector US I, Inc. ("Sun") leases store #6 located on the ground floor of the demised premises, and a portion of the cellar. Defendant SK Cartoleria Ltd. d/b/a Hyde Park Stationers ("Hyde Park") leases store #1 also located on the ground floor.

Plaintiff has also started an action against another commercial tenant at the building. Fernbach LLC v. Women by Peter Elliot Ltd. and American Business Clothiers Inc., Supreme Ct., N.Y. Co., Index No. 600359/05 ["Peter Elliot"]. Peter Elliot occupies store #5 on the ground floor. The Peter Elliot case has also been assigned to this court as a related action, at plaintiff's request.

Although the Sun and Hyde Park case has not been consolidated with the Peter Elliot case, and there is no pending motion for such relief, plaintiff has brought the identical motion against the defendants in both cases. Only Peter Elliot has cross moved for summary judgment. These cases have consistently been appearing on the court's calendars together, and both motions for summary judgment were argued the same day, at the same time. The defendants have presented a unified front against plaintiff's motions on many issues, even though they are separately represented. Therefore, in the interest of judicial economy, these motions will be considered and decided together in one decision, but separate original decision/orders will be filed in each case.

Procedurally, these motions are timely and issue has been joined. CPLR §3212. Each defendant maintains that the motions are premature because discovery is incomplete. These arguments are more properly addressed below since they concern the merits of plaintiff's motions (and Peter Elliot's cross motion) for summary judgment.

Discussion

There are several commercial tenants on the ground level of the building. Defendant Sun operates a retail store (#6) that sells "Vilebrequin" brand swim and beach wear. Defendant Hyde Park sells stationery and paper goods. It occupies store #1 at the other corner of the building. Defendant Peter Elliot has store #5, next door to Hyde Park's, and they also occupy the cellar space under Hyde Park's store.

Plaintiff intends to build five additional stories atop its existing 8 story building (including the ground floor) on Madison Avenue. These new floors will have luxury apartments for residential tenants. Presently, the second through eighth floors are occupied by statutory residential tenants. According to plaintiff (although it provides no documentary proof of this), it has secured $14,000,000 in financing for this project. Once the financing package closes, plaintiff expects to start the construction project immediately.

To support the additional new floors, the existing building structure will need to be reinforced. This will necessitate the installation of steel beams of "pylons." These pylons will start from the cellar and continue upward through the entire building. They will need to be bored through each and every existing floor and ceiling. One of the pylons is expected to be installed and bored through the floor and ceiling of Sun's store. Another pylon will be installed in Peter Elliot's cellar and bored through the ceiling, installed in Hyde Park's store and bored through the ceiling thereof.

The defendants have all denied plaintiff access to their stores, and in the case of Peter Elliot, the cellar, so that it can install the pylons in these spaces. The defendants maintain that plaintiff has no right under their respective leases to perform this work in

their stores because the work is not a repair, but simply a remodeling the building for plaintiff's own pecuniary gain. Plaintiff contends that it does not need the tenants' permission to enter and install these pylons because it has the contractual absolute right to do so under their respective leases.

Plaintiff has provided photographs and blueprints of the defendants' stores to show how the stores presently look. It has also provided blueprints of how it expects the building will look after the work is completed. Plaintiff also offers the affidavits of Nancy Guinan, an officer of its managing agent, G. Douglas Cutsogeorge[1], its architect, Simon Taylor, its project manager for construction project, and Christa E. Waring-Jagisch, apparently another architect or designer involved in the project. Collectively, these individuals explain generally what the project entails, what the snapshots and blueprints show, and they describe where they intend to install the steel pylons.

Mr. Taylor describes how an area within in each store will be walled off and installation of the pylons done within those confines. He maintains that this "ensures the safety of the defendants and their customers, and will also provide a fully sealed workspace that will prevent excessive dust and debris from entering the inside of the defendants' premises during their continued operation." He avers further that heavy construction will be done so that there is no need to interrupt the tenants' normal business operations. Mr. Taylor also opines that the construction of these pylons will take "no more than 15 business days or approximately three weeks." Finally, Mr. Taylor

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[1]Neither motion included this affidavit, although it was obviously served on the defendant since they refer to it. Chambers notified the parties of this omission and a copy of Mr. Cutsogeorge's affidavit was delivered. Although the cover letter reiterates that the original affidavits were filed and are behind Ms. Guinan's affidavit, they are not.

avers that the "look and feel" of defendants's stores will not be disrupted, nor will they suffer a loss of showcase space.

Each and every one of these factual claims are disputed by the architect for Sun and Hyde Park (Richard H. Balser), and by the principals of all three business (Stephen L. Senatore, for "Hyde Park," Thierry Prissert for "Sun," and Elliot Rabin for "Peter Elliot"). Mr. Balser opines that the stores cannot remain operational while the steel columns are being installed because the workspace is expected to be directly by each store's entrance and customers will be unable to enter and exit the stores. Although Peter Elliot's work would be in the cellar, this is where they keep inventory, and that the proximity to the work in Hyde Park on the street level will detrimentally affect its ground floor operation as well.

Defendants are skeptical that the noise and debris of such heavy construction work can be confined within the walled off area, and Mr. Balser opines that the work area contemplated by plaintiff is far too small for the workers to do their job effectively. All three stores are concerned that the well-heeled "impulse" shoppers along Madison Avenue that they rely on will go elsewhere to make their purchases, rather than deal with the mess and inconvenience of this major construction.

According to the diagrams provided, and the affidavits in support, the steel pylon in the Sun store would be installed directly behind its display window, to the left of the store's only entrance. Presently, the window has a light colored wood display with the name "Vilebrequin" on it. The display only partially blocks the window, it is not a straight column, and there is space between its highest point (which is a pointed tip) and the ceiling.

In the Hyde Park store the front door will need to be relocated Northward to

accommodate the steel pylon. The resultant column is expected to be roughly the same size (18 inches by 18 inches) and it will be right near the door.

In the Peter Elliot cellar, the pylon would be directly below Hyde Park's.

All three defendants have standard Real Estate Board commercial leases, but each lease has a different rider. The Peter Elliot lease has, in addition to the rider, other language added by an asterisks. The defendants and the plaintiff agree that paragraph 13 (which is identical[2] in each lease) directly bears on their dispute. It reads as follows:

> Access to Premises:
> 13. Owner or Owner's agent shall have the right (but shall not be obligated) to enter the demised premise in any emergency at any time, and at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in the premises, following Tenant's failure to make repairs or perform any work which Tenant is obligated to perform under this lease, or for the purpose of complying with laws, regulations and other directions of governmental authorities. Tenant shall permit Owner to use and maintain and replace pipes and conduits in and through the demised premises and to erect new pipes and conduits therein, provided they are concealed within the walls, floors or ceiling, wherever practicable. Owner may, during the progress of any work in the demised premises, take all necessary materials and equipment into said premises without the same constituting an eviction nor shall Tenant be entitled to any abatement of rent while such work is in progress nor to any damages by reason of loss or interruption of business or otherwise . . .

In the Sun lease, reference is made to paragraph 51 of the Rider. This

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[2]There are certain words not included in the Peter Elliot lease, but for purposes of this decision/order, the exclusion of the words "upon reasonable advance notice," "concealed," and "floors or ceiling, whenever practicable" does not alter the court's analysis, or its conclusion.

paragraph in the Rider provides as follows:

> 51. Access to Premises:
> Supplementing Article 13 of the printed form, at non-emergency times, Owner can enter premises only on notice to Tenant. In making repairs and replacement, if any, and taking necessary materials onto premises, if any, Owner shall take reasonable steps to attempt to limit disruption of Tenant's business as much as possible. Owner shall have the right to show the space to third parties only during normal business hours on reasonable notice to Tenant. Owner can perform work on behalf of Tenant during normal business hours on reasonable notice to Tenant and, with consent of Tenant, at all other times which consent will not be unreasonably withheld or delayed. . .

There is no such provision in the Hyde Park rider. However, the Hyde Park rider differently provides that:

> 53. Sale and Demolition:
> 53.01 Tenant agrees that Landlord, its successors or assigns, may cancel this Lease at any time on or after January 1, 2002 by giving Tenant at least six months prior written notice of such termination, in the event that Landlord, it successors and assigns, shall, in any instance, at any time, (i) contract to sell or sell the entire Demised Premises or the Land or Building forming a part thereof, or (ii) decide to demolish, tear down, remodel or alter the entire Building.

The printed portion of Peter Elliot's lease[3] also differently provides that: "Except in emergency situations, landlord shall be only permitted to enter the demised premises with materials and equipment for the purpose of making repairs when the store is not open for business to the public." The Peter Elliot rider contains no further provisions relevant to the dispute before the court.

Plaintiff contends that the addition of new floors to the building is an

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[3]Beyond the differences already noted in footnote 2, above.

"improvement," and that under the lease it has the unqualified right to access these stores to do the construction and installation of the pylons that will support them. Defendants' argument, particularly that of Peter Elliot in its cross-motion, that the addition of new floors to the building is not, as a matter of law, an "improvement" under the lease is rejected. Huron Assoc. v. 210 East 86th Street Corp., ___AD3rd___, 2005 WL 1038880, 2005 N.Y. Slip Op. 03754 (1st Dept 2005); Deutsche Bank v. 120 Greenwich Development Assocs., 2005 WL 782810 (Sup Ct., N.Y. Co 2005) [and cases cited therein].

Conversely, the court also rejects plaintiff's claim that the collateral advantages it believes the new construction will confer on the tenants (a new elevator and a ramp for handicap access), make the work a repair, replacement or restoration of existing building systems under the leases. Bijan Designer for Men, Inc. v. The St. Regis Sheraton Corp., 142 Misc2d 175 (Sup Ct. N.Y., Co. 1975) [heating, ventilation, plumbing and fire safety equipment had not been improved since 1927]. Not only has plaintiff failed to clearly correlate each benefit to each commercial tenant, any benefits they may derive would be purely happenstance, and clearly not the landlord's motivation for embarking on this formidable project. Nor are the steel pylons being added to remedy some non-conformity with any applicable code, statute, or regulation. Compare: Eastside Exhibition Corp. v. 210 East 86th Street Corp., (Sup Ct., N.Y. Co.) 6/7/04 NYLJ 18 (col. 3) [installation of steel cross-brace making theatre ADA compliant; pending Federal lawsuit].

The parties' core dispute is thus reduced to whether under the provisions of their printed leases (e.g. paragraph 13) the tenants must permit plaintiff access into leased

spaces to install the pylons, which are intended to support an improvement of additional floors being added to the top of the building.

Recently the First Department addressed this issue. It ruled that an identical lease clause permitted a landlord to enter a tenant's demised premises to make improvements to the building that are of no benefit to the tenant. Huron Assoc. v. 210 East 86th Street Corp., *supra*. In construing paragraph 13 of the printed lease, the court in Huron decided that it "gives landlord a right to make any building improvements it reasonably deems desirable, and is not limited to such access as is necessary to perform work that tenant itself was obligated to perform." Huron Assoc. v. 210 East 86th Street Corp., supra at 1. Plainly, landlord has the right to enter the defendants' stores (and cellar space) to make improvements, since it has their express contractual consent, even if the reason for the work is the landlord's own financial benefit. Huron, *supra*. [adding two stories to a building]. The decision in Huron, *supra*, warrants a denial of Peter Elliot's cross motion for summary judgment which urges a more crabbed reading of the lease.

The landlord's right of access is not, however, unfettered as it urges. Access provisions, such as the ones in the leases at issue, do not explicitly or implicitly authorize a landlord to simply take back a portion of a demised premises. Camatron Sewing Machine Inc. v F.M. Ring Associates Inc., 179 AD2d 165 (1st Dept 1992). Consequently, access for improvements is subject to a de minimus rule. The resulting intrusion should be de minimus and should not constitute a taking back of the premises in whole or in part. Camatron Sewing Machine Inc. v F.M. Ring Associates Inc., *supra*.; *See also:* Cut Outs Inc. v. Man Yun Real Estate Corp., 286 AD2d 258 (1st Dept 2001).

Where, as here, there are collateral lease provisions prohibiting the tenant from claiming eviction on account of the landlord making improvements, the de minimus rule is an appropriate and necessary limitation on a landlord's ability to take back any portion of the demised premises while still requiring the tenants to pay full rent.

The parties have factual disputes about whether the steel pylons, which will be permanent, are a de minimus taking of the demised premises, or something more substantial. Plaintiff concedes the columns will be permanent, and that they will be "only" 18 inches by 18 inches in size. It urges that this reduction in the retail space (and the usable cellar space) will not only be de minimus, but that it will not affect the "look and feel" of the two retail stores. The defendants dispute this, claiming that their demised premises are already small, and that any reduction of that space by these permanent structures will have a disproportionate negative effect on how they use their spaces, and their business. Whether the diminution in the retail space will be de minimus can only be decided after a trial. Cut-Outs Inc. v. Man Yun Real Estate Corp., *supra.*; Zuckerman v. City of New York, *supra*. Further contested factual issues between the parties are whether the noise, debris, and other interferences of the construction will be de minimus as well. Huron Assoc. v. 210 East 86th Street Corp., *supra*. Plaintiff claims defendants can operate their businesses during the construction, but the defendants contend this will be impossible because of the ensuing noise and debris. These issues also have to be decided after a trial.

Each defendant further contends that there is no point in letting the plaintiff proceed with the installation of these pylons if the landlord cannot successfully complete the construction project. Clearly, the pylons can only be considered an

improvement if plaintiff can complete the job of building the additional floors. The pylons in and of themselves are not improvements, but only support beams. It is undisputed that plaintiff has not obtained approval from the administrative agencies that regulate the residential tenants' apartments on the second through eighth floors. Initially, plaintiff indicated that it had the consent of the residential tenants. However, there is nothing in this record to support this claim, and even if the residential tenants were individually to agree, defendants raise issues about whether the statutory tenants can agree to this work without it also being approved by the appropriate regulating agencies. The issues about consent are all lightly brushed aside by the plaintiff who maintains they are peripheral to the contractual dispute between the parties. The court disagrees. There is an issue of fact regarding whether the viability of the entire project, which precludes summary judgment at this point.

As the proponent seeking partial summary judgment, plaintiff has the initial burden of setting forth evidentiary facts to demonstrate its entitlement to judgment in its favor as a matter of law, without the need for a trial. Zuckerman v. City of New York, *supra*. Peter Elliot has the same burden with respect to its cross motion for summary judgment. Neither plaintiff nor defendant Peter Elliot has met its burden on its respective motion and cross motion for summary judgment. Neither has established its prima facie case. Since there are issues of fact that require a trial of this action, the motions and cross motion for summary judgment must be denied. Zuckerman v. City of New York, *supra*.; Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993).

Since the court has denied the motions and cross motion for summary judgment on the merits, the court need not reach tenants' arguments that the motions are premature because discovery is not complete. Discovery should now proceed in due course. It appears that no preliminary conference has be held in either case; one is hereby scheduled for **June 16, 2005 at 9:30 a.m.** in each case. At that time the court will set a discovery schedule.

The remaining branch of plaintiff's motions is for a preliminary injunction against each defendant, permitting it to proceed with the construction in the demised premises, in advance of trial. While denial of the motions for summary judgment does not necessarily dictate that the preliminary injunction also be denied, plaintiff has otherwise failed to establish that the equities weigh in its favor, or that it will suffer irreparable harm if it is not allowed to proceed. Doe v. Axelrod, 73 NY2d 748 (1988); Paine v. Chriscott, 70 AD2d 571 (1st Dept 1979).

Plaintiff's argument, that everything is in place, and it is ready to proceed immediately with this project, is not borne out by this record. They do not have all the necessary consents. Moreover the landlord created the condition of urgency by obtaining financing for the project before it had all the necessary approvals, and was sure it had the right or ability to proceed.

Finally, the relief sought by plaintiff by preliminary injunction is not to preserve the status quo, but to obtain, in advance of trial, the ultimate relief. Such mandatory or affirmative relief is not a proper basis for the granting of a preliminary injunction. St Paul Fire & Marine Ins. Co. v. York, 308 AD2d 347 (1st Dept 2003); Rosa Hair Stylists

Inc. v. Jaber Food Corp., 218 AD2d 793 (2nd Dept 1995). Consequently, for each of the reasons provided, plaintiff's motions for a preliminary injunction is hereby denied as well.

Conclusion

Plaintiff's motions for summary judgment, and a preliminary injunction are denied for each reason provided herein. Defendant Peter Elliot's cross motion for summary judgment is also denied.

The court has scheduled a preliminary conference in both cases for **June 16, 2005 at 9:30 a.m.**

Any relief not expressly addressed herein has been nonetheless been considered by the court and is denied.

This shall constitute the Decision and Order of the Court.

Dated: New York, New York
May 27, 2005

So Ordered:

J.S.C.
HON. JUDITH J. GISCHE

FILED
JUN 07 2005
COUNTY CLERK'S OFFICE
NEW YORK