

**West Broadway Glass Company v Namaskaar of  
Soho, Inc.**

2005 NY Slip Op 30263(U)

April 13, 2005

Supreme Court, New York County

Docket Number:

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Justice

West Broadway Plaza Co.

INDEX NO. 0025/05

MOTION DATE —

MOTION SEQ. NO. 001

MOTION CAL. NO. —

NAMES & MAIL OF SOXO

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits —

Replying Affidavits —

PAPERS NUMBERED

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  
if ever data.*

**FILED**

APR 26 2005

COUNTY CLERKS OFFICE  
NEW YORK

Dated: 4/13/05

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

-----X

WEST BROADWAY GLASS COMPANY,

Plaintiff,

-against-

NAMASKAAR OF SOHO, INC., and  
"XYZ CORP."

Defendants.

-----X

**DECISION/ORDER**

Index No.: 600351/05

Seq. #: 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):

<b>Papers</b>	<b>Numbered</b>
Pl's OSC w/aff. (T.E.), exhs. . . . .	1
Def's Notice of Cross-Motion w/affirm. (A.J.W.), affs (A.S. & S.S.), exhs. . . . .	2
Pl's Aff. In Further Support of OSC (R.E.) w/aff. (P.T.), exhs. . . . .	3
Def's Notice of Appearance, Verified Answer & Counterclaims . . . . .	4

-----X

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

This action emanates from a lease agreement between the parties. Plaintiff seeks injunctive relief and damages. Defendant has counterclaimed for specific performance and damages.

Plaintiff is the owner and landlord of the premises located at 337A West Broadway in New York County ("landlord"). Defendant Namaskaar of Soho is the commercial tenant of the ground and second floors ("tenant") pursuant to an assumption of lease agreement made in March 1999. Landlord has brought an Order to Show Cause seeking a temporary restraining order against tenant performing any further construction at the premises. That relief was granted pending the hearing of the motion, and then extended pending the court's decision.

Tenant has cross moved for summary judgment on its affirmative defenses and counterclaims. It has served and filed its answer.

### **Discussion**

It is undisputed that construction work is presently underway at the subject premises. The lease expressly requires landlord approval of any work by the tenant in excess of \$25,000 or if structural in nature. Article 43 (b). Tenant admits that it did not seek the landlord's approval for the work before commencing it, nor did it submit any plans or specifications for its consideration. This is specifically required if the work performed is in excess of \$25,000, or requires "structural change." Article 43 (b). Paragraph 3 more broadly requires that the "Tenant shall make no changes in or to the demised premises of any nature without Owner's prior written consent."

Tenant contends that the work it did was merely cosmetic, even though it admittedly moved an entire staircase. *Compare: Harrar Realty v. Michlin & Hill*, 86 AD2d 182 (1<sup>st</sup> Dept 1982) [removable spiral staircase attached by single bolt].

All this work was performed without any permits by the Department of Buildings. The lease expressly requires the tenant to comply with all laws, orders, rules and regulations and to "obtain all governmental permits and authorizations." Tenant maintains that it is in the process of obtaining such a permit, and that it expects one imminently. It further contends that once it finished moving the staircase it hired an architect to "verify that the staircase conformed to applicable regulations, and to prepare and file plans with the DOB in order to obtain a permit" for it.

The tenant obtained insurance coverage for the work it did after the fact. It has provided a Certificate of Liability Insurance dated February 17, 2005, after the landlord

brought his order to show cause. Thus, the documentary proof establishes that the tenant was not in compliance with Article 43(b) of the lease when it began the work to the premises. The lease expressly obligates the tenant to "deliver to the owner and endorsement of its policy of comprehensive general liability insurance . . . covering risks during the course of the performance of the work and proof of workman's compensation insurance to cover all persons engaged and all contractors engaged by the Tenant." Article 3 more broadly provides that the tenant must also "cause Tenant's contractors and subcontractors to carry such workman's compensation, general liability, personal property damage insurance as Owner may require."

A preliminary injunction should not be granted unless the right thereto is plain from the undisputed facts and there is a clear showing of necessity and justification. O'Hara v. Corporate Audit Co., 161 AD2d 309 (1<sup>st</sup> Dept 1990). Not only has plaintiff-landlord shown that a preliminary injunction is necessary to maintain the status quo, the plaintiff has also established a likelihood of success on the merits, irreparable harm, and that the equities balance in its favor. W.T. Grant Co. v. Srogi, 52 NY2d 496 (1981).

Defendant's insistence that the work is simply cosmetic, and it will shortly have the necessary permit, does not tip the equity scale in tenant's favor. To the contrary, this strongly supports landlord's claim that the tenant boldly proceeded with this construction work, without the owner's permission.

For these reasons, plaintiff's motion, for a preliminary injunction pursuant to CPLR §6301 is hereby granted. The defendant Namaskaar of Soho Inc., their agents, assigns, employees, and all others acting under their supervision and/or direction, are hereby preliminarily enjoined and restrained from commencing, continuing and/or

conducting any structural and nonstructural alterations, constructions, improvements or other work to the premises at Ground Floor and Floor above the Store at 337A West Broadway, New York, 10013.

Plaintiff's motion for a permanent injunction is denied without prejudice. It is the ultimate relief that it has asked for in its complaint, and it will be the subject of the trial.

The tenant has asserted counterclaims against the landlord, all of which emanate from the landlord's refusal to let tenant assign its lease. It has cross moved for summary judgment in its favor on its first and second counterclaims, directing landlord's specific performance. It also seeks partial summary judgment on its third counterclaim for monetary damages.

On a motion for summary judgment, the proponent must set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial. Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). If the court grants the motion, it is the functional equivalent of a trial. It is, therefore, a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1977).

The lease provides that the landlord shall not "unreasonably" withhold or delay its consent to a proposed assignment or sublease under the lease - provided the tenant is not in default of any of its obligations under the lease. Article 59(D). Though tenant maintains that it was not in default under the lease when it asked landlord for permission to assign/sublet the lease, plaintiff has provided documentary proof that, at the very least, raises material factual disputes as to those claims.

At the time tenant and/or the proposed assignee/subtenant approached the

landlord about the lease assignment/sublease, there were outstanding violations against the tenant and it owed rent. The Environmental Control Board had issued a violation against the premises (No. 070001296J) in September 2004. The violation was for the erection of a flagpole in front of the store (it apparently had the name "Namaskaar" on it). The tenant did not clear the violation until February 2005, after the landlord started a holdover proceeding.

The tenant also had rent arrears, and the landlord had begun a holdover proceeding to recover the premises for nonpayment of rent (L&T 030877/2005). There was also an unresolved "Notice of Pleading" brought by the New York Division of Alcoholic Beverage Control (No. 3701-2004/Case No. 20069) as a result of a noise complaint emanating from the ground floor leased by the tenant. Finally, there is a strong claim that tenant had, in violation of the lease, already begun or prepared to do work at the premises, which is the subject of the underlying complaint. It did so, apparently without the proper approvals and insurance in place.

Individually, and collectively, these incidents raise material factual disputes about whether the tenant was in default (as plaintiff claims, and as tenant denies) at the time it presented landlord with the proposed lease assignment/sublease. Consequently, tenant's motion for summary judgment on its counterclaims must be denied. The court further notes that there has been no discovery in this case, and landlord has not waived same. Since there has been no preliminary conference in this case either, one is hereby scheduled for May 12, 2005 at 9:30 a.m. at 80 Centre Street, Room 122.

### **Conclusion**

It is hereby

ORDERED that plaintiff's motion for a preliminary injunction pursuant to CPLR §6301 is hereby granted; and it is further

ORDERED that pending determination of the underlying claim for a permanent injunction, defendants Namaskaar of Soho Inc. and "XYZ" Corporation, their agents, assigns, employees and all others acting under their supervision and/or direction are hereby preliminarily enjoined and restrained from commencing, continuing and/or conducting any structural and nonstructural alterations, constructions, improvements or other work to the premises at Ground Floor and Floor above the Store at 337A West Broadway, New York, 10013; and it is further

ORDERED that defendant's Namaskaar of Soho Inc.'s motion for summary judgment is denied in all respects; and it is further

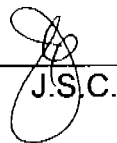
ORDERED that the parties shall appear for a preliminary conference on **May 12, 2005 at 9:30 a.m.** at 80 Centre Street, Room 122.

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  
April 13, 2005

**FILED**  
APR 26 2005  
COUNTY CLERK'S OFFICE  
NEW YORK  
So Ordered

  
\_\_\_\_\_  
J.S.C.  
**HON. JUDITH J. GISCHE**