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

PRESENT: KORNREICH Justice

PART 54

88 BROAD LLC

- v -

PLAZASTRAW LLC

INDEX NO. 105911/07

MOTION DATE 5/10/07

MOTION SEQ. NO. 1

MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion to/for preliminary injunction

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-6
Replying Affidavits	7-8

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 17 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 5/14/07

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

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 54

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80 BROAD STREET, LLC,

DECISION & ORDER

Plaintiff,

-against-

Index No.: 105911/07

PLAZASTRAW, LLC,

Defendant.

----------X

KORNREICH, SHIRLEY WERNER, J.:

Plaintiff, 80 Broad Street, LLC ("Landlord"), moves by order to show cause for a preliminary injunction enjoining defendant, Plazastraw, LLC ("Tenant"), from refusing to allow Landlord's contractors temporary access to the demised premises for the purpose of replacing and improving Tenant's storefront. The demised premises is one of four stores on the ground floor of the building located at 80 Broad Street, New York, NY ("Building"). The motion is granted for the reasons that follow.

Tenant is the successor in interest to Broadstraw, Inc. ("Broadstraw"), which in 1974 entered into occupancy of the store under a lease with 80 Broad Company, LP ("Broad Company"), for a term commencing May 15, 1974 and ending November 30, 1992 ("1974 Lease"). On May 20, 1980, 250 Broadway Associates ("250") and Broadstraw entered into an Agreement ("1980 Addendum"), stating that 250 had succeeded to Broad Company's interest under the 1974 Lease, and granted Broadstraw an option to extend the term of the lease.

On December 1, 1992, Broad Street Plaza Associates ("Broad Street Plaza"), as owner, and Simco Stores, Inc. ("Simco"), as tenant, entered into a new lease ("1992 Lease") for the

store. The parties are in agreement that the 1992 Lease (Ex. 4 to the Order to Show Cause) is the current lease in effect between Landlord and Tenant for the store which originally further was leased to Broadstraw. The 1992 Lease contains a rider ("Rider"), which recites in paragraph 62 that Simco was in possession under the 1974 Lease as amended by the 1980 Addendum, collectively referred to as the "Existing Leases." The final sentence of paragraph 62 of the Rider provides that "[t]his lease amends, replaces and restates, in their entirety, all terms and provisions of the Existing Leases."

Article 4 of the 1992 Lease provides that:

> Except as specifically set forth in Article 9 [relating to fire and other casualty] or elsewhere in this lease, there shall be no liability on the part of Owner by reason of inconvenience, annoyance or injury to business arising from Owner, Tenant or others making or failing to make any repairs, alterations or improvements in or to any portion of the building, including the erection or operation of any crane, derrick *or sidewalk shed*, or in or to the demised premises or the fixtures or appurtenances or equipment thereof. [emphasis provided]

Article 13 of the 1992 Lease, then, provides, in pertinent part, as follows:

> Owner or Owner's agents shall have the right ... to enter the demised premises ... upon reasonable advance notice ... to ...make such ... 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. Owner shall use reasonable efforts to minimize the interference with Tenant's business in the demised premises caused by any such work performed by Owner.... 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 any damages by reason of loss or interruption of business or otherwise.... *Owner shall have the right at any time, without the same constituting an eviction and without incurring liability to Tenant therefore to change the arrangement and/or location of public entrances, passageways, doors, corridors, elevators, stairs, toilets, or other public parts of the building....*

[emphasis provided]

Finally, paragraph 61 of the Lease Rider provides:

> if Owner is performing any work in the demised premises ... , and, as a result, ... Tenant is unable to use all or any part of the demised premises for three (3) consecutive business days or more, Base Rent therein then reserved and all additional rent payable hereunder in respect of such space shall be abated for the period during which such space remains unusable.

In January 2007, Landlord notified Tenant of a plan to remodel the four existing store fronts and the entrance to the Building. The plans call for replacing the existing doors. The Landlord wishes to use a box construction that extends three feet out from the exterior and three feet into Tenant's store in order to stage all construction within the box and avoid causing damage to the inside of the store. Temporary access to Tenant's store and signage will be provided during the period of construction, which is estimated to last for three months. Landlord states that the purpose of the renovation is to make the Building appear uniform, to add decorative plate glass, to better support the structure of the store fronts and to make the store entrances compliant with the American Disabilities Act. The plans include replacement of Tenant's revolving door, flanked by two glass handicapped accessible doors, which will be functional during stage two of the construction. At the time of the present application, Landlord has almost completed the remodeling of the other three stores. Landlord states that Tenant's refusal to grant access is causing delay damages.

Tenant counters that Landlord has no right to alter the store front because of alterations tenant previously made approximately thirty years before. Tenant disingenuously relies on paragraph 41 to the 1974 Lease, pursuant to which it installed the existing storefront in 1974, including windows and window displays, and installed the existing revolving door in 1980.

Paragraph 41 of the 1974 Lease provides that "permission is hereby granted to the Tenant to make, at its sole cost and expense, alterations, decorations, improvements and installations ... including a new store front." Tenant also states that in 2004 it changed its exterior signs in accordance with the provisions of paragraph 52 of the 1992 Lease, which provides that "Tenant may, without Owners prior consent, place or install any sign ... on the exterior of the demised premises ...."

The instant case is similar to *Eastside Exhibition Corp. v. 210 East 86th Street Corp.*, 23 A.D.3d 100 (1st Dept. 2005). In *Eastside Exhibition*, the Court affirmed the dismissal of the tenant's claims for a permanent injunction preventing the landlord from doing any further alteration work in the demised premises. The landlord had constructed support braces in the tenant's movie theater in connection with a plan to construct additional stories on the building, which deprived the tenant of a portion of its premises. The lease in *Eastside Exhibition* contained language almost identical to Article 13 of the 1992 Lease in this case. It permitted the landlord to enter the premises at reasonable times to make repairs and improvements and, unlike the lease here, provided that there would be no abatement of rent while such work was in progress. The *Eastside Exhibition* lease provided that landlord need pay no damages by reason of loss or interruption of business; Article 4 of the lease in *Eastside Exhibition* was identical to Article 4 of the instant 1992 Lease. It provided that there would be no liability on defendant's part for inconvenience, annoyance or injury to business arising from the making of any repairs or improvements to any portion of the building or in or to the demises premises. *See also, Cut-Outs, Inc. v. Man Yun Real Estate Corp.*, 286 A.D.2d 258 (1st Dept. 2001)(landlord authorized to obstruct access to premises during construction where lease authorized landlord to change

entrances and did not allow tenant to recover damages for inconvenience, annoyance and business interruption).

Tenant's reliance on *Chambers Delicatessen, Inc. v. Realty Equities Park Chambers Corp.*, 28 A.D.2d 531 (1st Dept. 1967), is misplaced. In *Chambers Delicatessen,* unlike this case, the tenant made ***required*** alterations to the store front under the lease in effect at the time of the application and would have sustained substantial damages if the landlord's renovations were to proceed. Here, Tenant was ***permitted*** to renovate the store front under a lease executed more than 30 years ago, which has been superseded by the 1992 Lease, and Tenant will suffer no damages other than business interruption losses if Landlord proceeds with the work. Indeed, provision is made for a rent abatement. Similarly, *Bruce v. Woll Bros., Inc.,* 8 N.Y.2d 1052 (1960), cited by Tenant, is inapposite because there too the tenant had made ***required*** alterations and enlargements to a store front under its current lease and would have permanently lost a portion of the enlarged store front if the landlord proceeded with alterations.

In addition, Tenant's reliance on paragraph 41 of the 1974 Lease is misplaced, as paragraph 62 of the Rider to the 1992 Lease states that it "amends, replaces and restates, in their entirety, all terms and provisions" of the Existing Leases. Article 52 of the 1992 Lease, which permits Tenant to place signs is unavailing, as Tenant was not required to place any signs on the Building.

A preliminary injunction should be granted where a movant demonstrates: a likelihood of ultimate success on the merits; that irreparable injury would result in the absence of preliminary injunctive relief; and that a balancing of the equities to effect substantial justice and to preserve the status quo warrants the grant of extraordinary relief. *Pilgreen v. 91 Fifth Ave. Corp., 91*

A.D.2d 565, 567 (1st Dept.1982), *app. dismissed*, 58 N.Y.2d 1113 (1983). Here, Landlord has demonstrated that it is likely to succeed on the merits, that it will be damaged if it cannot complete its renovations and that the equities are on its side. Since access and signage will be provided and Tenant will not permanently lose any store space, any damages Tenant could possibly claim are for money only. Accordingly, it is

ORDERED that the motion by 80 Broad, LLC, for a preliminary injunction is granted, and Plazastraw, LLC, hereby is enjoined during the pendency of this action. from refusing to allow 80 Broad, LLC and its contractors access to its premises located at 80 Broad Street, New York, NY, to install a protective shed on the interior and exterior sides of Plazastraw's store front, and to work within the protective shed to replace and improve said storefront, including installing an ADA-compliant entrance and new revolving door, in conjunction with replacement and improvement of all the storefronts and/or entrances of the ground floor retail tenants of 80 Broad Street, New York, NY, the facade of said building and the main lobby thereof.

Dated: May 14, 2007 ENTER:

J.S.C.