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

PRESENT: Hon. Marcy S. Friedman Justice

PART 57

Societe Air France

-v-

Met Tower I, LLC

INDEX NO. 104675/07

MOTION DATE

MOTION SEQ. NO. 01

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	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion LS

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

FILED

JUN 15 2007

COUNTY CLERK'S OFFICE NEW YORK

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

Dated: 6-11-07

Hon. Marcy S. Friedman J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

DAHLMAN ROSE & COMPANY, LLC,

Index No.: 104121/07

Plaintiff,

- against -

DECISION/ORDER

MET TOWER I, LLC, et al.,

Defendants.

SOCIETE AIR FRANCE a/k/a COMPAGNIE NATIONALE AIR FRANCE,

Index No.: 104675/07

Plaintiff,

- against -

MET TOWER I, LLC, et al.,

Defendants.

In these related actions, plaintiff-tenant Societe Air France ("Air France") and its subtenant, plaintiff Dahlman Rose & Company, LLC ("Dahlman"), sue defendant-landlords (collectively "Met Tower") for a declaratory judgment determining that defendants are obligated to provide electric service and ventilation and air conditioning services ("VAC services") to a space leased by Air France and sublet to Dahlman on the 17th floor of defendants' premises at 142 West 57th Street in Manhattan ("17th floor space"). Both plaintiffs moved for a preliminary injunction enjoining defendants from terminating or directing defendants to restore such services

to the premises. By letter dated May 15, 2007, Dahlman withdrew its motion to the extent that it duplicates Air France's motion.

The relevant facts are largely undisputed: Air France or its former subtenant, Ann Taylor, occupied the 17th floor space from the inception of Air France's lease in 1992 through September 2006 when Ann Taylor vacated. Throughout this period, there was one electric meter and one air handling system on the 17th floor. Defendants or their predecessors provided electricity and VAC services to Air France's 17th floor space, billing Air France 37.4% of the charges from the electric meter on the floor, based on Air France's percentage of the total square footage of the floor. After Ann Taylor announced that it would vacate, Air France sought permission to sublet to plaintiff Dahlman, an investment banking firm. Defendants denied permission, and the matter was resolved at an arbitration which resulted in an award, dated December 21, 2006, directing approval of the Dahlman sublease. The award was subsequently confirmed by order of this Court (Gische, J.), dated October 18, 2006, which provided that "the subtenant may take occupancy, immediately or later upon such terms as the sublease provides." By letter dated November 28, 2006 (Air France Motion, Ex. G), defendants notified Air France that it would be required to obtain electricity directly from the utility company and to submit plans for this work (i.e, the installation of an electric meter) before any occupancy of the 17th floor space by Dahlman would be permitted. By letter dated January 17, 2007 (Dahlman Motion, Ex. T), defendants also took the position that because Air France would be unable to directly meter the existing air handling system which serviced the entire floor, Air France would be required to install its own air handling unit "so it can accurately measure on its own direct meter its electric energy usage." Defendants acknowledge that prior to the Dahlman subtenancy, defendants or their predecessors provided electricity to the space and billed Air France on a pro-rata basis, and that the prior

owner also provided air conditioning service through the single air handling unit on the 17th floor. (See id.)

It is well settled that a preliminary injunction is a drastic remedy which will be granted "only where the movant shows a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted and a balance of equities in the movant's favor (Grant Co. v Srogi, 52 NY2d 496, 517; McLaughlin, Piven, Vogel, Inc. v Nolan & Co., 114 AD2d 165, 172, lv denied 67 NY2d 606)." (Chernoff Diamond & Co. v Fitzmaurice, Inc., 234 AD2d 200, 201 [1st Dept 1996].) "The movant has the burden of establishing a right to this equitable remedy." (McLaughlin, Piven, Vogel, 114 AD2d at 172.) It is further settled that the purpose of a preliminary injunction is to maintain the status quo (Matter of 35 New York City Police Officers v City of New York, 34 AD3d 392 [1st Dept 2006]) and that, even where factual disputes exist, a preliminary injunction should be granted where necessary to preserve the status quo provided that a showing is made that irreparable harm will result absent the injunction. (See State of New York v City of New York, 275 AD2d 740 [2d Dept 2000]; U.S. Ice Cream Corp. v Carvel Corp., 136 AD2d 626 [2d Dept 1988].)

In the instant case, there is a dispute between the parties as to whether Air France's lease requires it to obtain electricity directly from the utility company and therefore to obtain its own meter. It is undisputed that paragraph 47(A) of the lease, on which defendants rely, provides that "Tenant shall obtain all electric energy used or to be used in the demised premises (including without limitation electric energy for the air handling units on each floor of the Premises) directly from the public utility company furnishing electric service to the Building." While acknowledging this provision, plaintiffs contend that there is an ambiguity in the lease, as paragraph 47(C) also requires defendants to provide electricity at specified watts "dedicated to

serve the Building heating, ventilating and air-conditioning equipment serving such floor." Plaintiffs also contend that the parties' course of dealing over 13 years evidences the intent of the parties that VAC services be provided from the unit installed on the floor by the landlord, and that electricity for the unit be metered by the sole meter on the floor and apportioned pro-rata to the units based on the percentage of space each unit occupies.

Applying the above standards, the court holds that a preliminary injunction should be awarded. An injunction is inappropriate "when sought upon contractual language that leaves the rights of the parties open to doubt." (SportsChannel Am. Assocs. v National Hockey League, 186 AD2d 417, 418 [1992]. Accord Credit Index, L.L.C. v RiskWise Intl. L.L.C., 282 AD2d 246 [1st Dept 2001].) Here, in contrast, the injunction is not sought on the basis of the language of the lease which must be construed on the ultimate resolution of this action. Rather, the injunction is sought, and is appropriate, to maintain the status quo based on the parties' long course of conduct, pending resolution of their dispute over their obligations under the lease. Absent an injunction, plaintiffs will clearly sustain irreparable injury, as Dahlman is unable to take occupancy of the space without electricity or air conditioning. (See Classic Bookshops (Intl.) Ltd. v 48th Am. Co., 140 AD2d 201 [1st Dept 1988] [preliminary injunction preventing termination of electric service granted to preserve status quo pending determination of action for declaration of rights to electric service under lease].) In addition, the balance of equities strongly predominates in plaintiffs' favor. After losing the arbitration proceeding over whether they were required to accept Dahlman as a subtenant, defendants in effect engaged in self-help to prevent Dahlman from occupying the premises by unilaterally reversing a 13 year course of conduct and insisting that plaintiffs sub-meter the 17th floor space.

Finally, while a mandatory injunction should not be granted absent extraordinary

circumstances (see St. Paul Fire & Marine Ins. Co. v York Claims Serv., Inc., 308 AD2d 347 [1st Dept 2003]; Rosa Hair Stylists, Inc. v Jaber Food Corp., 218 AD2d 793 [2d Dept 1995]), the court is not persuaded by defendants' claim that the award of an injunction to plaintiffs will involve more than de minimis mandatory relief. In opposition to plaintiffs' motions, defendants submit the affidavit of Henry Celestino, managing agent for various of the defendants, who asserts that "the Landlord has disconnected all of the wiring and dismantled the entire air handling system for the 17th floor." (Celestino Aff., sworn to Apr. 20, 2007, ¶ 10.) The affidavit is silent as to the date on which the system was allegedly dismantled or the steps taken to disconnect the wiring. In reply, plaintiffs submit the affidavit of Russell Ross, a licensed engineer, who attests that he visually inspected the premises on April 24, 2007; that the ventilating/air conditioning unit was in the same condition as it had been in when he inspected the premises on March 27; that "[t]he air handling unit has not been touched" (Ross Aff., sworn to Apr. 25, 2007, ¶ 3); and that "none of the wiring or electrical conduits servicing the Air France portion of the floor have been touched." (Id., ¶ 4.) Plaintiffs' engineer further opined that "power could be restored instantaneously by merely turning all of the circuit breakers servicing that portion of the floor to the 'on' position." (Id.) He also stated that the air handling unit "could be activated in a matter of a few minutes by merely turning it on and if needed, installing rather simple filters to protect it against construction dust and dirt [in the landlord's portion of the 17th floor space that is under construction], and providing a damper to limit airflow to the space under construction." (Id., ¶ 3.)

Defendants' wholly conclusory assertion that the wiring has been disconnected and the air conditioning unit dismantled is insufficient, in the face of plaintiffs' engineer's detailed report to the contrary, to raise a triable issue of fact as to the availability of electric and air conditioning

services from existing facilities. In any event, even if defendants will have to make repairs in order to restore the electricity and reactivate the air handling unit, such mandatory relief is warranted by the extraordinary circumstances presented by this case – namely, defendants' unilateral termination of the electrical and air conditioning service notwithstanding defendants' or their predecessors' provision of such service for over 13 years.

The court accordingly holds that a preliminary injunction should be awarded in favor of Air France. As Dahlman's motion is duplicative, relief will be awarded only to Air France. The posting of an undertaking is mandatory. (See CPLR 6312[b]; Moy v Umeki,10 AD3d 604 [2d Dept 2004]; Hightower v Reid, 5 AD3d 440 [2d Dept 2004].) The amount of the undertaking "is a matter within the sound discretion of the court * * *. However, the amount of the undertaking must be rationally related to the amount of the [movant's] potential liability if the preliminary injunction later proves to be unwarranted." (Lelekakis v Kamamis, 303 AD2d 380 [2d Dept 2003].)

The court holds that Air France's undertaking should be fixed in the amount of the estimated pro-rata electric charges to be apportioned to Air France's 17th floor space for12 months, a period longer than it should take to resolve this action as it will be placed on an expedited track. The charges will be calculated at the rate of $257 per month, the amount on the bill sent to Air France for the period from July 24, 2006 to August 22, 2006 (Air France Motion, Ex. F), or a total of $3,084. In so holding, the court notes that defendants did not contend that this bill was unrepresentative of electric charges for the 17th floor space.

It is accordingly hereby ORDERED that plaintiff Air France's motion is granted to the following extent: 1) Defendants and all others acting on their behalf are enjoined and restrained, pending the hearing and determination of this action, from discontinuing or interrupting electrical

service and VAC service to the 17th floor space leased to Air France and sublet by Dahlman at 142 West 57th Street, New York, New York; and, to the extent such service has been discontinued or interrupted or the equipment for the provision of such service has been disconnected, dismantled or damaged, defendants shall restore said electrical and VAC service within 5 business days after service of a copy of this order with notice of entry, and shall provide such service pending the hearing and determination of this action; and 2) the injunction set forth in paragraph 1 is conditioned upon plaintiffs' posting, within five days of service of a copy of this order with notice of entry, of an undertaking by cash or surety company bond in the amount of $3,084; and it is further

ORDERED that in the event of defendants' failure to provide service pursuant to this order, plaintiff Air France shall be entitled to deposit rent for the 17th floor space as it accrues, commencing with the month of July 2007, in an escrow account maintained by plaintiff's attorney; and it is further

ORDERED that plaintiff Dahlman's motion is deemed withdrawn; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 57 of this Court on July 12, 2007 at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York
June 11, 2007

MARCY FRIEDMAN, J.S.C.