Meridian Capital Partners, Inc. v Fifth Ave. 58/59 Acquisition Co. GP Corp.
2007 NY Slip Op 31988(U)
June 21, 2007
Supreme Court, New York County
Docket Number: 0600660/2007
Judge: Richard B. Lowe
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SCANNED ON 7/9/2007

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

PRESENT: HON. RICHARD B. LOWE, III Lowe Justice PART 56m

Meridian Capital Partners, Inc. INDEX NO. 600660/07

MOTION DATE 3/2/07

- v -

MOTION SEQ. NO. 001

Fifth Ave 58/59 et al 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

FILED
JUL 06 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 6/21/07

HON. RICHARD B. LOWE, III
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: IAS PART 56

MERIDIAN CAPITAL PARTNERS, INC.,

Plaintiff,

Index No. 600660/07

-against-

FIFTH AVENUE 58/59 ACQUISITION CO. GP CORP., MACKLOWE PROPERTIES INC. and MACKLOWE MANAGEMENT, LLC.

Defendants.

FILED

JUL 06 2007

NEW YORK
COUNTY CLERK'S OFFICE

RICHARD B. LOWE III, J.:

Plaintiff Meridian Capital Partners, Inc. (Meridian) moves by order to show cause for a preliminary injunction enjoining defendants Fifth Avenue 58/59 Acquisition Co. GP Corp. (58/59 Acquisition), Macklowe Properties Inc., and Macklowe Management, LLC from demolishing, reconstructing, renovating, refurbishing or otherwise altering the appearance or function of the elevator lobby of the 12th floor of the "GM Building," located in Manhattan, New York, without Meridian's approval.

Background

Meridian is a commercial tenant occupying space on the 12th floor of the GM Building pursuant to a lease (Lease), between defendant 58/59 Acquisition's predecessor in interest, Trump 767 Fifth Avenue, LLC. 58/59 Acquisition is the landlord (Landlord) of the premises. Defendants Macklowe Properties Inc. and Macklowe Management, LLC (together, Macklowe) are affiliated with 58/59 Acquisition, and own and manage the GM Building. Meridian alleges that the "GM Building," located at 767 Fifth Avenue, in Manhattan, New York, is a premier office building at a prestigious location; Meridian pays more than $1 million annually in rent.

The parties' dispute originates out of the terms of the Lease that permit Meridian to refurbish portions of the common areas located across from the elevator on the 12th floor (Elevator Lobby), subject to certain conditions. According to Meridian, Article 42 of the Lease authorizes Meridian to control the appearance of the Elevator Lobby throughout the term of the Lease, and bars the defendants from renovating or otherwise altering the Elevator Lobby without Meridian's approval.

In late 2006, Meridian was advised that certain portions of the 12th floor, including portions of common areas, the Elevator Lobby and restrooms, were to be demolished and renovated (Complaint at ¶ 13), to accommodate a new tenant, who was to move into the remainder of the 12th floor that was unoccupied by Meridian (Affidavit of Donald Derfner at ¶ 9). Meridian strenuously objected to the proposed renovations, and cited Article 42 of the Lease as barring defendants from permitting the alteration of the appearance of the Elevator Lobby without Meridian's approval.

Despite Meridian's protestations, on February 28, 2007, defendants permitted demolition of the 12th floor common areas to commence, including the Elevator Lobby, restrooms, and halls, by removing carpeting, baseboards and flooring, and locking the common bathrooms on the floor (Complaint at ¶ 21; Affidavit of Peter Brown, Esq. at ¶ 9).

Thereafter, Meridian commenced this lawsuit, seeking a permanent injunction enjoining defendants from altering the appearance of the Elevator Lobby without Meridian's approval, and from demolishing other portions of the 12th floor common areas without making appropriate provisions to protect Meridian. Additionally, Meridian asserts a cause of action for partial actual eviction, and seeks money damages for the alleged diminished value of its leasehold. Meridian

now seeks preliminary injunctive relief.

Discussion

A party seeking preliminary injunctive relief pursuant to CPLR 6301 must demonstrate a likelihood of success on the merits, irreparable injury if provisional relief is denied, and that a balancing of the equities is in its favor (*Kimeldorf v First Union Real Estate Equity and Mtge. Invs.*, 309 AD2d 151, 155 [1st Dept 2003]). A preliminary injunction is a drastic remedy that should be granted only if the moving party establishes clear entitlement upon the relevant facts set forth in the moving papers (*Uniformed Firefighters Assoc. v City of N.Y.*, 79 NY2d 236 [1992]).

Meridian's first claim to enjoin defendants from demolishing and altering the appearance of the Elevator Lobby without Meridian's approval is based upon Article 42 of the Lease, which purportedly grants Meridian the exclusive right to control the appearance of the Elevator Lobby throughout the term of the Lease, and obliges the Landlord to obtain Meridian's approval prior to making any alterations there. In addition to the Lease, Meridian submits several communications made by Macklowe executives, wherein they purportedly concede that Meridian has a leasehold interest in the appearance of the Elevator Lobby.

Interpretation of an unambiguous lease is an issue of law for the court to determine (*401 East W. 14th St. Fee LLC v Mer Du Nord Noordzee, LLC,* 34 AD3d 294, 295 [1st Dept 2006]). Further, in interpreting the provisions of a lease, the court should refrain from rewriting it under the guise of construction (*45-02 Food Corp. v 45-02 43rd Realty LLC,* 37 AD3d 522 [2d Dept 2007]).

Article 42 of the Lease, entitled "Refurbishing of Elevator Lobby," states:

> "Landlord agrees that Tenant may refurbish the 12th floor elevator lobby subject to the following conditions:
>
> > a) prior to March 31, 2003 Landlord shall submit to Tenant for Tenant's approval a set of plans and specifications for the work ('the Elevator Lobby Work').
> >
> > b) after the plans and specifications are approved by Tenant the Elevator Lobby Work shall be submitted for bids to contractors acceptable to Landlord.
> >
> > c) Landlord and Tenant shall agree on the successful bidder to whom the contract will be awarded and the amount of such bid. Landlord shall pay up to $100,000 of the cost of the Elevator Lobby Work including the reasonable cost of the plans and specifications and Tenant shall pay any excess thereof."

Article 42 of the Lease does not grant Meridian the exclusive right to control the appearance of the Elevator Lobby for the term of the Lease; rather, the plain language grants Meridian the right to pre-approve the Landlord's plans and specifications to renovate the Elevator Lobby, prior to March 31, 2003, in addition to obligating the Landlord to pay up to $100,000 of the costs of that renovation. Contrary to Meridian's assertion, this clause does not contain any language establishing that the right to pre-approve the Landlord's plans and specifications to renovate the Elevator Lobby remained in effect subsequent to March 31, 2003, the date expressly provided for in the clause.

While Meridian argues that Article 42 of the Lease was a bargained-for right, whereby Meridian and its former landlord, Trump, intended to create a leasehold interest in the appearance of the Elevator Lobby on Meridian's behalf that was to last the entire term of the Lease, the language of the Lease does not support this interpretation. Further, Meridian has not established that any other provision of the Lease supports the exclusive right to control the

appearance of the Elevator Lobby. The term "Demised Premises," as used in the Lease to refer to the space leased to Meridian, is outlined in a floor plan of the 12th floor annexed to the Lease. The floor plan clearly indicates that the Demised Premises includes Meridian's office space only, and does not include any other common areas, including the Elevator Lobby (Lease § 1.02; Floor Plan).

Moreover, there are other clauses in the Lease by which Meridian consented to the Landlord to make alterations, improvements and renovations to the common areas, including the Elevator Lobby, as the Landlord deemed necessary, and further provides that the Landlord is not liable for damages to Meridian, so long as the Landlord does not unreasonably interfere with Meridian's use of the Demised Premises. Section 18.05 of the Lease states, in part:

> "Landlord reserves the right, without incurring any liability to Tenant therefor, to make such changes in or to the Building and the Fixtures and equipment thereof, as well as in or to the street entrances, halls, passages, elevators, escalators and stairways thereof, as it may deem necessary or desirable; provided that (a) the work shall be performed at such times and using such methods as will not unreasonably interfere with Tenant's use of the Demised Premises."

In addition to the Lease, Meridian submits several letters from Macklowe executives, wherein they allegedly concede that Meridian has an enduring leasehold interest in the appearance of the Elevator Lobby. However, in the absence of an ambiguity in the language of the Lease, which neither party asserts, permitting the submission of extrinsic evidence that serves to alter or contradict the plain and unambiguous language of the Lease, is improper (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]).

Meridian's second claim is for partial actual eviction, and arises out of the demolition of the Elevator Lobby and surrounding common areas, including corridors and restrooms. Meridian

alleges that as a result of the demolition of these areas, the Landlord has exposed Meridian and its employees to dangerous conditions, that its employees have been barred from using the common area restrooms located on the 12th floor, and that defendants are prohibiting Meridian's employees from using stairs in order to access alternate restrooms on another floor, and instead, demanding that Meridian's employees use elevators to access the alternate restrooms (Complaint at ¶ 13).

An eviction, whether partial or complete, occurs when the landlord wrongfully ousts the tenant from physical possession of the leased premises (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82 [1970]). There must be a physical expulsion or exclusion to constitute an eviction (*id.*).

Here, Meridian consented to the Landlord making alterations, improvements and repairs to common area halls, passages, escalators and stairways, in the event that the Landlord deemed it necessary (Lease § 18.05). Further, the Lease states that the Landlord is not liable for damages to Meridian, so long as the Landlord's methods do not unreasonably interfere with Meridian's use of the Demised Premises (*id.*).

Therefore, because section 18.05 of the Lease provides consent to the Landlord to repair, alter and make improvements, and that the Landlord would not be liable in damages to Meridian except under certain circumstances, the conduct Meridian complains of does not constitute an actual eviction (*Bijan Designer for Men v St. Regis Sheraton Corp.*, 142 Misc 2d 175, 181 [Sup Ct, NY County], *affd* 150 AD2d 244 [1st Dept 1989]).

As for the 12th floor restrooms, section 17.06 permits the Landlord to suspend service to the restrooms serving the Demised Premises only under certain specified conditions, including

emergencies. Further, section 17.06 obligates the Landlord to "exercise reasonable diligence" in restoring service to the restrooms, and must give Meridian "reasonable notice, when practicable, of the commencement and anticipated duration of such stoppage." The Landlord does not address whether one of the conditions specified in section 17.06 permitting suspension of service to the restrooms existed, or whether it exercised reasonable diligence in suspending service and providing notice to Meridian of the stoppage (Affidavit of Opposition of Richard Claman, Esq. at ¶ 43).

However, this issue need not be resolved in this motion, because, despite the allegations concerning the suspension of service to the 12th floor restrooms, Meridian has not demonstrated a likelihood of success on the merits of its cause of action for partial actual eviction. The complaint does not contain allegations that Meridian was actually physically excluded from the Demised Premises (*see Barash,* 26 NY2d at 82). Rather, Meridian merely alleges that defendants barred Meridian employees from using the 12th floor restrooms as they are being renovated, and refused to allow them access to a more convenient route to the alternate restrooms (Affidavit of Urgency of Donald A. Derfner, Esq. at ¶ 13).

While the Landlord's renovation of the common areas may have caused Meridian substantial inconvenience, and the suspension of service to the 12th floor restrooms without proper cause may have been unreasonable, because Meridian does not allege that it was ever prohibited access to the Demised Premises, the conduct alleged does not constitute a partial actual eviction (*1328 Broadway, LLC v MCM Footwear Ltd.,* 1 Misc 3d 910 (A), 2004 WL 178566 [Civ Ct, NY County 2004]). Therefore, Meridian has not demonstrated a likelihood of success on the merits of its cause of action for partial actual eviction (*compare Camatron Sewing*

Mach. v F.M. Ring Assoc., 179 AD2d 165, 168 [1st Dept 1992] [provision in lease permitting alterations in common areas of building did not authorize landlord to permanently take demised area, and thus, the landlord's plan to move lobby wall three feet into the demised area constituted a partial actual eviction]).

Notwithstanding the exculpatory clause in the Lease that permits the Landlord to make renovations without being liable to Meridian, a right to compensatory damages may lie if the Landlord exceeded the rights granted to it in the Lease, particularly with respect to suspension of service to the 12th floor restrooms (*see Bijan Designer For Men, Inc.*, 142 Misc 2d at 181). Ultimately, while determination of whether the Landlord used reasonable efforts to minimize the impact of the common area renovations on Meridian, and whether the conditions permitting suspension of the 12th floor restrooms existed, involves the resolution of disputed issues of fact (*Incredible Christmas Store-N.Y., Inc. v RCPI Trust,* 307 AD2d 816, 817 [1st Dept 2003]), the availability of an adequate remedy at law, namely, money damages, renders injunctive relief unavailable to Meridian (*Made from Scratch v Sony USA,* 203 AD2d 1, 2 [1st Dept 1994]).

Meridian has also failed to demonstrate that it would be irreparably harmed in the absence of injunctive relief. According to Meridian, the Elevator Lobby currently looks like a "war zone," which is threatening its business (Transcript of Oral Argument at 17:8, 16-18). However, where, as here, a party can be made whole by monetary damages, preliminary injunctive relief is not available (*J.O.M. Corp. v Department of Health of the State of N.Y.,* 173 AD2d 153, 154 [1st Dept 1991]).

Finally, Meridian failed to demonstrate that a balancing of the equities is in its favor. Notably, the relief that Meridian seeks - the cessation of renovation of the 12th floor common

areas - will not restore the Elevator Lobby to its prior appearance. Further, while Meridian has an adequate remedy at law, defendants potentially face another lawsuit in the event that the court issues a preliminary injunction. According to defendants, the new tenant is seeking to rebuild the 12th floor common areas on an expedited schedule, because the new tenant is obliged to vacate the premises that it currently occupies by the expiration of its lease. If renovations are not completed by that date, the new tenant will likely be precluded from relocating to the GM Building by the expiration of its lease with defendants commences, and likely faces substantial monetary penalties for holding over - a loss that it may seek to recoup from defendants, resulting in the commencement of another lawsuit against them. Meridian does not refute this assertion. The potential imposition of this hardship upon the defendants indicates that the balance of equities do not weigh in Meridian's favor. Therefore, because Meridian failed to demonstrate a likelihood of success on the merits, that it will be irreparably harmed absent injunctive relief, and a balancing of the equities is in its favor, the motion for a preliminary injunction is denied.

Accordingly, it is

ORDERED that the motion for a preliminary injunction by Meridian Capital Partners, Inc. is denied.

FILED
JUL 06 2007
NEW YORK
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Dated: June 21, 2007

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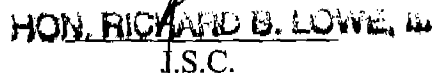

J.S.C.